LIBRARY
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
AUG 20 1957
JOHN T. FEY, Clerk

No. 390

BRIEF FOR APPELLANT AND APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,680

RAFAEL RIVERA,

Appellant,

v.

JAMES P. MITCHELL,
Secretary of Labor,

and

APPEALS BOARD OF THE EMPLOYEES COMPENSATION BUREAU

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
For the
District of Columbia Circuit
FILED FEB 27 1957
Joseph W. Stewart
CLERK

JESSE L. ROSENBERG
15 Park Row
New York 38, New York

WILLIAM C. KOPLOVITZ
938 Bowen Building
Washington 5, D. C.

Counsel for Appellant

February 1957

STATEMENT OF QUESTIONS PRESENTED

1. Whether the District Court erroneously ruled that appellant (plaintiff below) has no justiciable right which could support the relief sought in his complaint.

2. Whether the District Court erroneously ruled that this suit is in substance an action against the United States of America which has not consented to be sued in such matter and has not waived its immunity.

3. Whether the District Court has jurisdiction over the subject matter and parties to this action and should therefore have denied appellees' motion to dismiss.

INDEX

	Page
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	2
STATUTES INVOLVED	4
STATEMENT OF POINTS	5
SUMMARY OF ARGUMENT	6
ARGUMENT	
I. The $5000 of Insurance Was Contracted For and Paid By The Shipping Company (the U. S. Lines Co.) As Part of The Seaman's Wages On The Voyage. It Was Fully Earned on Sept. 14, 1942, The Date Of His Injury.	8
II. The Maintenance As An Out-Patient Of $577.50 Was Part Of The Wages Contracted For, And It Was Paid to Rivera as Wages By The U. S. Lines Co., The Shipping Company	10
III. The Wages Back To Home Port After The Injury Were Paid By The Shipping Company As Part Of The Wages Contracted For In The Shipping Articles	11
IV. The Appeals Board Had No Jurisdiction To Hold That The Wages, Consisting of Insurance, Maintenance As An Out-Patient, And Wages Back to Home Port, Paid By The Shipping Company, Were All Workmen's Compensation Paid By the U. S., And So Off-Set Them From Workmen's Compensation	12
V. There Is No Exclusion Of Court Review Of Decisions Of The Secretary Which Is Applicable To This Case	18
VI. The Appeals Board Had No Jurisdiction To Refuse To Appraise The Value of Plaintiff's Maintenance on Board Ship Before He Was Injured, As Part Of His Monthly Pay	21
CONCLUSION	22

CITATIONS

Cases:

Amer. School v. McAnnulty, 187 U.S. 94	15
Blanc v. U.S., 140 F. Supp. 481	19
Calderon v. Tobin, 88 App. D.C. 134, 187 F. 2d 514	14
Calmar v. Taylor, 303 U.S. 525	10
Fraser v. U.S., 72 F. Supp. 1, Aff'd 167 F. 2d 141	21
Great Lakes Co. v. Geiger, 261 Fed. 275	12
Hust v. Moore McCormack, 328 U.S. 707, 735	17
Martinez v. Matson Co., 97 Fed. 2d 19	12
Pacific Mail Co. v. Lucas, 264 Fed. 938; Aff'd., 258 U.S. 266	12
Soc. Sec. Brd. v. Nierotko, 327 U.S. 358	13
The Progress, 21 F. Supp. 572	11

Miscellaneous:

Webster's New International Dictionary	13

CITATIONS (Continued)

Page

Statutes:

Act of March 4, 1915, 38 Stat. 1168, 46 U.S.C.A. 713 17

Act of September 7, 1916, Employees Compensation Act, 39 Stat. 742, 5 U.S.C.A. 751 . . . . . 2, 3, 14, 18, 22

Act of March 24, 1943, 57 Stat. 45, 50 U.S.C.A. 1291 Appen. 3

Act of July 1, 1944, 58 Stat. 712, 5 U.S.C.A. 757 . . . . . 7, 16

Act of July 28, 1945, 59 Stat. 503, 5 U.S.C.A. 793 . . . 4, 8, 14, 17, 18, 19, 20, 21

Act of June 11, 1946, 60 Stat. 243, 5 U.S.C.A. 1009, for judicial review 4, 7, 17, 22

Act of October 14, 1949, Sec. 203, 206, 63 Stat. 862, 5 U.S.C.A. 762 . . . 7, 15, 21

UNITED STATES COURT OF APPEALS

For The District Of Columbia Circuit

No. 13,680

RAFAEL RIVERA,

Appellant,

v.

JAMES P. MITCHELL,
SECRETARY OF LABOR,
and
APPEALS BOARD OF THE EMPLOYEES COMPENSATION BUREAU

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

On October 16, 1956 the District Court granted appellees' motion to dismiss the complaint filed by appellant in that court. The jurisdiction of this Court to review said decision is invoked under Title 28, U.S.C. Section 1291.

STATEMENT OF CASE

The U. S. Lines Co. at all times was, and still is a private shipping corporation. The words "United States" in its name do not mean or imply that the corporation was anything but a private corporation, and there is no contrary idea in the case. There is no mention in the shipping articles of the U. S. or of any other entity than the Shipping Co.

The S. S. Nathaniel Greene was at all times mentioned herein a freight ship which was owned and operated by the U. S. Lines Co. (App. 1).

At New York on March 27, 1942, the plaintiff a seaman, signed on as seaman and wiper, on the Nathaniel Greene. He signed the Shipping Articles Contract in regular form with the Captain and the rest of the crew. The Shipping Articles were solely those of the U.S. Lines Co. The seaman signed on as a seaman of the U. S. Lines Co.

In the shipping articles the U. S. Lines Co. expressly contracted to pay to Rivera wages which are classified: in part as general wages of $87.50 per month; in part as special war risk bonus payments; and in part as war risk insurance of $5000, in case he was totally disabled by enemy action. Under the seamen's maritime contract the shipping company also contracted as matter of law, that in case the seaman was injured, it would pay him his wages back to home port, and would furnish hospital treatment, and pay the seaman's maintenance while he was being treated as an out-patient. The parts of his wages here involved are the insurance of $5000 in case he was totally disabled (which is not disputed); and his wages back to home port of $624.17; and the payment made to him for maintenance as an out-patient of $577.50. All of these 3 items were paid to him by the U. S. Lines Co. as voyage wages under his contract. But the Appeals Board set them off from the compensation found to be due him as a U.S. employee, under the Act of September 7, 1916.

Rivera's service on the voyage lasted from March 27, 1942 to September 14, 1942, the date he was injured.

On September 14, 1942 the Nathaniel Greene was in waters northeast of England, in a large convoy of ships going from Iceland to Murmansk, Russia, loaded with war materials. The ship and convoy were under constant attack and suffered many losses. At 3:30 p.m. on September 14, 1942, Rivera was hit by a missile from an explosion made by an enemy bomber. As a result he was totally disabled after months of hospital treatment. A great part of his left shoulder, left arm and back were shot away and lost in treatment. When he was hit he was doing assigned duty on a gun deck platform built above the main deck of the ship, and passing ammunition to and assisting an anti-aircraft gunner.

At that time Rivera as a seaman, employed by the shipping company which was operating for the U. S. was a U.S. employee and entitled to compensation under the U.S. Compensation Act of September 7, 1916.

There is no dispute about this. Congress removed seamen from being U.S. employees under the Compensation Act, by a later Act of 3/24/43, 57 Stat. 45, 50 U.S.C.A. 1291 Appen. which especially retained all such rights which had already accrued.

The Appeals Board has deducted as set-offs from the workmen's compensation found to be due to Rivera, said insurance paid as wages, and said wages back to home port, and said payments of maintenance by the shipping company for the time during which the seaman was treated as an out-patient.

The Appeals Board has also refused to appraise and evaluate the value of the wages paid to Rivera by the shipping company as maintenance on board the ship before he was injured, from 3/27/42 to 9/14/42, as part of his monthly pay.

By making said deductions and by such refusal to appraise, the Appeals Board acted outside of its uathorized jurisdiction. And by well settled law the acts of an administrative agency done outside of its statutory authority are subject to court review and reversal.

Said acts are also erroneous and reviewable since they were not made under the Act of 7/28/45 (59 Stat. 503. 5 U.S. C.A. 793).

There is no preclusion of review in this case. The U.S.C. 1952, Title 5, sec. 793, and 5 U.S.C.A. 793 are erroneous and invalid. They purport to change the Act of 7/28/45 in words and sense.

The Complaint contains proper allegations for court review and reversal of said acts. The other facts will be presented in the Points.

STATUTES INVOLVED

The Act for Judicial Review of Agency Action (60 Stat. 243, 5 U.S.C.A. 1009) provides: "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion *** any person suffering legal wrong because of agency action *** shall be entitled to review thereof. ***The form of proceeding for judicial review shall be *** any applicable form of legal action (including actions for declaratory judgments***) in any court of competent jurisdiction. *** So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall ***. hold unlawful and set aside agency action, findings, and conclusions found to be *** not in accordance with law *** unsupported by substantial evidence *** or unwarranted by the facts".

The Act of July 28, 1945, 59 Stat. 503, adds one new paragraph to section 42 of the Compen. Act (39 Stat. 750). Said act of 7/28/45 is the only statute which in any way cuts off court review of acts of the

Appeals Board. It does not apply here. It provides: "Whenever the Commission shall find the amount of compensation, as provided by other provisions of this Act, payable to employees of the United States who are neither citizens nor residents of the United States, any territory, or Canada, *** is substantially disproportionate to compensation *** payable in similar cases under local law *** the Commission may provide for payment of compensation upon such basis as will be reasonably in accord with prevailing local payments in similar cases", may "redesignate the class or classes of beneficiaries", may "compromise and pay claims for any benefits so provided for. *** Should the Commission find that conditions prevent the establishment of facilities for processing and adjudicating claims of such non citizens and non residents *** the Commission may waive the application of this Act. *** The Action of the Commission *** in allowing or denying any payment under this Act shall be final and conclusive *** and not subject to review by any other official of the United States, or by any Court *** and credit shall be allowed *** for payments in accordance with such action."

It is notable that the preclusion of review applies only to "payment under this Act", that is, under the Act then being enacted, of 7/28/45, which gave the Commission the right to modify and pay as it saw fit the compensation to be paid to such persons who were both non-residents and non-citizens on account of injuries occurring outside of the U.S. or any Territory, or Canada.

STATEMENT OF POINTS

Appellant makes the following Points showing errors committed in dismissing the complaint.

I. The $5000 of insurance was contracted for and paid by the shipping company as part of the seaman's wages on the voyage. It was fully earned on the date of injury.

II. The maintenance as an out-patient was contracted for and paid by the shipping company as part of the wages.

III. The wages back to home port were contracted for and paid by the shipping company as part of the wages.

IV. The Appeals Board had no jurisdiction to hold that wages consisting of insurance, maintneance as an out-patient and wages back to home port, paid by the shipping company, were workmen's compensation and deduct them from such compensation.

V. There is no exclusion of court review which applies in this case.

VI. The Appeals Board had no jurisdiction to refuse to appraise the value of plaintiff's maintenance on board ship as part of his monthly pay.

VII. The judgment appealed from should be reversed in all respects.

SUMMARY OF ARGUMENT

In the shipping articles contract the shipping company contracted to pay the appellant seaman as parts of his wages and terms of service on the voyage.

1. The insurance of $5000 in case of total disability.

2. The wages back to home port, of $624.17.

3. The maintenance as an out-patient, of $577.50.

The shipping company actually paid those items as wages.

The Appeals Board had no jurisdiction to set off those parts of wages and deduct them from workmen's compensation found to be due to appellant.

Clearly the Appeals Board had no jurisdiction to deduct wages earned from, and paid by the shipping company, as wages earned in full

before the injury. It would have no jurisdiction to deduct from compensation a victory bond or other property owned by Rivera. The deductions of contract wages earned and paid to him is not different. Said wages earned as of the date of injury and paid have no relation to compensation under the Compensation Act.

The Act for judicial review of agency action (5 U.S.C.A. 1009, 60 Stat. 243) provides that "except so far as statutes preclude judicial review or agency action is by law committed to agency discretion", any person aggrieved shall be entitled to judicial review thereof. That the reviewing court shall decide all relevant questions of law, and set aside any agency action found to be not in accordance with law, unsupported by substantial evidence or unwarranted by the facts.

The reviewing court determines whether the agency action was properly within the scope of its jurisdiction. It has long been settled law that where an agency acts beyond its jurisdiction its acts are illegal and courts have jurisdiction to reverse such acts.

The Act of 7/1/44, sec. 605; (58 Stat. 712, 5 U.S.C.A. 757), provides that the "proceeds of any insurance policy" do not require any election between statutory benefits which a person may be entitled to receive from the U.S. (App. 22). This in substance provides that insurance and compensation are separate and are not to be confused. This is naturally so. Insurance and compensation are not the same subject matter. And here also the insurance was part of wages contracted for and paid, not by the U.S., but by the shipping company.

The Appeals Board also had no jurisdiction to refuse to appraise the value of plaintiff's food and quarters on board ship before he was injured. Such appraisal is required by sec. 762 of the Compensation Act (5 U.S.C.A. 762, 63 Stat. 862).

There is no preclusion of right to review which applies to the present case. The only preclusion of right to review is contained

in the Act of 7/28/45, 59 Stat. 503. That Act provides that in cases where compensation is to be paid to persons who are neither residents nor citizens of the U.S., for injuries occurring outside of the U.S. any Territory or Canada, the Secretary may make many changes in the Compensation Act, and even waive it in some instances. And it provides that for payments made only under said Act of 7/28/45 there shall be no court review. Said Act does not apply here to exclude review. The U.S.C. and the U.S.C.A. have changed the language of said Act of 7/28/45, so as to make it apply to the whole Compensation Act and Title in this respect. They are clearly contrary to the said Act of 7/28/45, and they are not the law. (U.S.C. 1952, Title 5, sec. 793, 5 U.S.C.A. 793). They cannot change the Act of 7/28/45.

And in any event the acts of the Appeals Board complained of are subject to review and reversal as done outside of its jurisdiction.

ARGUMENT

POINT I.

THE $5000 OF INSURANCE WAS CONTRACTED FOR AND PAID BY THE SHIPPING COMPANY (the U.S. Lines Co.) AS PART OF THE SEAMAN'S WAGES ON THE VOYAGE. IT WAS FULLY EARNED ON SEPT. 14, 1942 THE DATE OF HIS INJURY.

The shipping articles were in the usual form dated March 27, 1942, signed by the Captain and Rivera and all the other members of the crew. They were a contract exclusively between the shipping company and the crew. They contained the provision:

"Agreed that war bonus payments and insurance will be paid in accordance with decisions of the Maritime War Emergency Board". (App. 2, 14)

The U.S. entered the 2nd World War on Dec. 7, 1941. The maritime seamen were working on ships which carried war equipment

to Europe and Russia and which were being attacked and sunk by Germany and her allies. The problem was to fix the wages to be paid to such seamen for the very great risks involved. The seamen's unions and the shipping companies held conferences in Washington, and on Dec. 18, 1941 they signed a "Statement of Principles". This provided in part: That the seaman should not strike or stop services. That collective bargaining agreements should be continued. That the President should be asked to appoint a Board to fix war bonuses and the insurance against personal injury by enemy action which should be paid as wages to the seamen for such services during the war. The President appointed such a Board by order dated December 19, 1941. It was called "Maritime War Emergency Board". The 3 members were Steelman, McCauley and Graham (App. 14-20). The Board made orders fixing the war bonuses and insurance which should be paid to such seamen under various conditions. By 2 orders dated December 22, 1941 and February 6, 1942 said Board fixed and signed a complete detailed form of insurance policy by which each shipping company should insure each seaman (App. 15-18). It provided for insurance and payment of $5000 for total disability by enemy action, to be paid by each shipping company to each seaman such as Rivera. And pursuant to said orders by the Board the shipping articles of Rivera provided that such insurance should be paid as set forth above (App. 2). Then after Rivera was injured said $5000 of insurance was paid to him by the U. S. Lines Co. which had contracted to do so (App. 3).

The foregoing shows that the $5000 of insurance was contracted for by Rivera as voyage wages, and that it was paid to him as wages, by the U. S. Lines Co. which as the shipping company had contracted to pay said insurance as wages. And said insurance was, of course, fully earned at the date of the injury. But compensation could only begin to run after the date of the injury. The insurance as wages had nothing to do with workmen's compensation. It was not connected with compensation in any way.

POINT II.

THE MAINTENANCE AS AN OUT-PATIENT OF $577.50 WAS PART OF THE WAGES CONTRACTED FOR, AND IT WAS PAID TO RIVERA AS WAGES BY THE U. S. LINES CO. THE SHIPPING COMPANY.

It is thoroughly settled law that by the maritime contract contained in the shipping articles the shipping company contracts that in case the seaman is injured the shipping company will furnish him with proper hospital treatment, and if he is treated as an out-patient for a reasonable time as part of his hospital treatment, the shipping company will pay his maintenance while being so treated as an out-patient. That such maintenance as an out-patient is due to the seaman as matter of contract. That it is part of his voyage wages under the maritime contract.

The U. S. Lines Co. fully recognized that the foregoing was due from it under the maritime contract. It paid to Rivera as maintenance, $577.50 for 231 days, at $2.50 per day, for the time when Rivera was treated as an out-patient, which was from December 26, 1942 to August 14, 1943 (App. 3, 24).

It is well settled that such maintenance as an out-patient is not payment of compensation for the injury received, but is paid under the contract contained in the shipping articles, as part of the terms and conditions and wages of the employment. In Calmar v. Taylor, 303 U.S. 525, 527-9, Justice Stone says:

> "The ancient duty of a vessel and her owner to provide maintenance and cure for seamen injured or falling ill while in service *** arises from the contract of employment", and is not restricted to cases where there is "negligence or culpability on the part of the owner or master *** nor is it restricted to those cases where the seaman's employment is the cause of the illness.

> *** It is not an award of compensation for the disability suffered. *** The maintenance exacted is comparable to that to which the seaman is entitled while at sea, *** and 'cure' is care, including nursing and medical attention during such period as the duty continues". (Emphasis supplied).

It was there held that the maintenance as an out-patient is a matter of contract and wages.

In The Progress, 21 F. Supp. 572, Neterer J. says, p. 573: "The ship's articles constitute a contract between the seaman and the ship for wages, maintenance, and cure for illness during the voyage. After entering upon the voyage, the seaman became entitled as of course, during the voyage to (a) maintenance, (b) cure for illness, (c) wages for the voyage".

The foregoing shows that the $577.50 paid by the shipping company to Rivera, as maintenance while he was an out-patient, was paid under contract as part of his wages. That it was not workmen's compensation and had nothing to do with it.

The right to maintenance was fully earned under the contract, for services fully rendered at the date of injury. But workmen's compensation could begin to run only after the injury. The two are not connected in any way. They are not in the same subject matter.

POINT III.

THE WAGES BACK TO HOME PORT AFTER THE INJURY WERE PAID BY THE SHIPPING COMPANY AS PART OF THE WAGES CONTRACTED FOR IN THE SHIPPING ARTICLES

Rivera was injured on 9/14/42. He was shipped back to home port by the U. S. Lines Co. and arrived at Brooklyn, N. Y. on December 26, 1942. It is not disputed that the U. S. Lines Co. paid

him as his wages for that time $624.17 (App. 3, 25). It is clear that these wages back to home port were paid to the seaman as wages contracted for in the shiping articles.

In Pacific Mail Co. v. Lucas, 264 Fed 938, Cir 9, affd, 258 U.S. 266, Gilbert C. J. p. 941 says: "The appellee, having fallen sick on the voyage, was entitled to recover his full wages for the trip for which he was engaged, and the necessary expenses incurred in his cure."

The shipping articles are a "maritime contract" to pay a seaman's wages to the end of the voyage. So held in Martinez v. Matson Co., 97 Fed. 2nd, 19, Cir. 5. Great Lakes Co. v. Geiger, 261 Fed. 275, Cir. 6.

Rivera was totally disabled for life from doing physical work. He did not and could not render any service on the voyage after he was injured. Thus his wages back to home-port were fully earned under the maritime contract as of the date when he was injured. They are clearly not in the same subject matter as workmen's compensation, which can begin to run only after the injury was received.

POINT IV.

THE APPEALS BOARD HAD NO JURISDICTION TO HOLD THAT THE WAGES, CONSISTING OF INSURANCE, MAINTENANCE AS AN OUT-PATIENT, AND WAGES BACK TO HOME PORT, PAID BY THE SHIPPING COMPANY, WERE ALL WORKMEN'S COMPENSATION PAID BY THE U.S., AND SO OFF-SET THEM FROM WORKMEN'S COMPENSATION.

Clearly workmen's compensation is not of the same subject matter as wages and insurance paid as wages. And here also, the shipping company was the contracting party. It contracted to pay and paid the wages as insurance and other wages.

Webster's New International Dictionary, 1954, defines "Workmen's Compensation Act", as "a statute giving to a workman *** a right against his employer to a certain compensation on the mere occurrence of an accident".

The same authority defines "Insurance", as "A contract whereby, for a stipulated consideration, called a permium, one party undertakes to indemnify or guarantee another against loss by a certain specified contingency or peril, called a risk".

The same authority defines "Wages" as "Pay given for labor, usually manual or mechanical, at short stated intervals, as distinguished from salaries or fees".

It is a matter of common sense and logic, in the nature of things, that past wages, contracted for and earned before the injury and paid, are a different subject matter from employee's compensation under the Compensation Act of September 7, 1916.

The sole jurisdiction of the Appeals Board, is to apply and enforce, and make decisions under, the Employee's Compensation Act of September 7, 1916. As matter of course it has no jurisdiction except as within the subject matter of the Compensation Act. It is a matter for judicial review, to define the limits of any administrative agency, and to reverse acts done outside of the authorized jurisdiction of such agency.

In Soc. Sec. Brd. v. Nierotko, 327 U.S. 358, an employee had obtained an amount of back pay under the Nat. Labor Relations Act. And the Soc. Sec. Brd. had refused to hold that said back pay was wages to be credited to the employee's old age account, with respect to the taxes thereon as wages, and to the employee's old age benefits. It was held that the Soc. Sec. Brd. had no jurisdiction to treat said back pay as different from wages. And that the jurisdiction of an administrative agency is to be defined by the courts. Justice Reed, p. 369-70, says:

> "Administrative determinations must have a basis in law and must be within the granted authority. Administration, when it interprets a statute so as to make it apply to particular circumstances, acts as a delegate to the legislative power. *** An agency may not finally decide the limits of its statutory power. That is a judicial function. ***
>
> "We conclude, however, that the Board's interpretation of this statute to exclude back pay goes beyond the boundaries of administrative routine and the statutory limits. *** It is beyond the permissible limits of administrative interpretation."

In other words, there is a natural limit to the jurisdiction and power of the Appeals Board. It had no power to hold that wages contracted for and paid for services rendered, i.e. wages paid as insurance, maintenance as a out-patient, and wages back to home port, were not wages but workmen's compensation under the Act of 9/7/1916.

The Appeals Board apparently purports to follow the decision in Calderon v. Tobin, 88 App. D.C. 134, 187 F. 2nd 514. In that case the facts and the issue involved fully distinguish it from the present case. In that case three women claimed to be the widow of a deceased seaman. It was clearly within the jurisdiction of the Appeals Board to decide which was the widow. The Court of Appeals held p. 136: "The federal employees' compensation allowances are grants by Congress, and the agents of the Congress have power to determine the recipients of such grants". On those facts the court held that under sec. 793, of the Compensation Act there was no court review of the decision of the Appeals Board deciding who of the 3 women was the widow of the deceased sailor.

The issue there decided by the Appeals Board was clearly and obviously decided under the Compensation Law. The court noted that the compensation allowance was a grant by Congress. On the contrary, in the present case the wages were contracted for and paid. They obviously were not a grant. And no statute gives the Appeals Board

jurisdiction to decide that wages contracted for and paid by the shipping company, are payments of compensation grants by Congress.

The law has long been settled that when an administrative officer does acts which are outside of his jurisdiction his acts will be reviewed and reversed by the courts. That in such case he deprives the plaintiff of his property rights. In Amer. School v. McAnnulty, 187 U.S. 94 (1902) the postmaster of the City of Nevada, Missouri, and the Postmaster General, were depriving the plaintiffs of the use of the mails, on the alleged ground that the business conducted by plaintiffs in magnetic healing and Christian Science was fraudulent. It was held that where an administrative officer does acts which are outside of his statutory authority as matter of law, the person injured may enjoin such acts in the federal courts. Justice Peckham pp. 109-10, says:

> "The facts, which are admitted of record show that the case is not one which by any construction of those facts is covered or provided for by the statutes under which the Postmaster General has assumed to act, and his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts, and the Courts, therefore, must have power in a proper proceeding to grant relief. Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual. Where the action of such an officer is thus unauthorized he thereby violates the property rights of the person whose letters are withheld".

Said McAnnulty case has been very much cited and followed, and is settled law. It is applicable here to prevent the Appeals Board from depriving the plaintiff of part of his contracted wages on the voyage.

Congress by its Act of 10/14/49, sec. 206 amended sec. 12 of the Compen. Act, so as to provide that after Nov. 1, 1949, the bonus payments for extra hazardous service in time of war, should not be taken into account in computing the monthly pay for compensation purposes. (63 Stat. 862, 5 U.S.C.A. 762). This is a full recognition

that before November 1, 1949, the bonus payments made to seamen and the insurance on account of the war risks, were part of the monthly wages of the voyage. Said Act of 10/14/49, sec. 206, provides:

> "In computing monetary compensation for disability or death upon the basis of monthly pay *** bonus or premium pay for extraordinary service (including amounts paid as bonus for particularly hazardous service ir time of war) shall not be taken into account."

Clearly that is an express statement that up to November 1, 1949, the war bonus and war insurance contracted for and paid on this voyage, do constitute wages for the voyage, and are included in the monthly pay for compensation purposes. The insurance being wages paid for the voyage, it cannot be deducted as compensation previously paid, any more than the basic wages of $87.50 per month could be so deducted, which latter the Appeals Board did not deduct.

Congress by its Act of 7/1/44, sec. 605, amended sec. 7 of the Compensation Act, so as to provide in substance that "the proceeds of any insurance policy" are separate and distinct from compensation under the said act. Said Act of 7/1/44, 58 Stat. 712, 5 U.S.C.A. 757, provides:

> "Provided that whenever any person is entitled to receive any benfits" under the Compen. Act, "by reason of his injury *** and is also entitled to receive from the United States any payments or benefits (other than the proceeds of any insurance policy), by reason of such injury *** under any other Act of Congress, because of service by him *** as an employee *** such person shall elect which benefits he shall receive".

The above statute expressly provides that "the proceeds of any insurance policy" shall be excluded and not regarded on the point of election between benefits to be received under 2 Acts of Congress. And it provides in substance, by necessary implication, that "the proceeds

of any insurance policy" shall not be deemed compensation or benefits under any such Act of Congress.

As said by Justice Douglas in Hust v. Moore McCormack, 328 U.S. 707, 735: "The Shipping Articles, however, are by statute required to be an engagement between the master and the crew. 38 Stat. 1168, 46 U.S.C.A. 713". The engagement in the shipping articles on this voyage, made a contract by the ship and the shipping company to pay as part of the wages of the voyage, the specified insurance, the maintenance as an out-patient, and the wages back to home port. And they were paid by the shipping company under said contract. And the Appeals Board, as matter of course, had no jurisdiction to hold that they were workmen's compensation.

The "Act for Judicial Review of Agency Action" (5 U.S.C.A. 1009, 60 Stat. 243, sec. 10) provides: "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion *** any person suffering legal wrong because of any agency action *** shall be entitled to judicial review thereof". The act provides that final agency action may be reviewed by any form of legal action including actions for declaratory judgments. That the scope of the review shall include, that the reviewing court shall decide all relevant questions of law, construe provisions of statutes and constitution and determine the meaning and application of any agency action. In the face of these provisions, section 793 of the Compensation Act, in providing that the action of the Secretary allowing or denying any payment under the sections of this title "shall be final and conclusive for all purposes and with respect to all questions of law and fact, and shall not be subject to review *** and credit shall be allowed in the accounts of any certifying or disbursing officer for payments in accordance with such action", should not be construed to apply to acts here done which were outside of the subject matter of the Compensation Act.

The jurisdiction of the Secretary is confined by judicial determination of the scope of his authority. The decision here takes wages of the voyage which were contracted and paid by the shipping company, not by the U.S., and holds them to be not wages but workmen's compensation paid by the U.S. Such decision is not within the subject matter of the Compensation Act. It should be reversed, as made outside of the authority of the Appeals Board.

The foregoing shows that the insurance, maintenance as an outpatient, and wages back to home port, were all contracted for and paid by the shipping company, U.S. Lines Co., as wages on the voyage. And shows that wages paid on the voyage were not in the same subject matter as workmen's compensation. And shows that the Appeals Board acted outside of its jurisdiction in holding that said items paid as wages, were compensation paid in advance of the claim filed for compensation.

POINT V.

THERE IS NO EXCLUSION OF COURT REVIEW OF DECISIONS OF THE SECRETARY WHICH IS APPLICABLE TO THIS CASE.

The only Act which provides for exclusion of review is the Act of 7/28/45, 59 Stat. 503. That Act added a long new paragraph to Section 42 of the Compensation Act, giving the Commission (now Secretary) full power to make many changes in the Compensation Law, in the enforcement of it, in certain cases. It is expressly limited to apply only where payments of compensation are to be paid to persons who are non-citizens and non-residents of the U.S., any Territory or Canada. It provides for exclusion of court review of any "action *** allowing or denying any payment under this Act", that is, action under said Act of 7/28/45. It does not mean "any action" under the whole of the Compensation Law, which is Ch. 458 of laws of 1916 (37 Stat. 742).

In the U. S. Code of 1952, prepared by a Committee, the language of the Act of 7/28/45, "Action *** under this Act", was changed to "action ***under Sections 751-756, 793 of this title". (U.S. Code, Title 5, Sec. 793). The U.S.C.A. followed that change in 5 U.S.C.A. 793. But said change of the language of the Act of 7/28/45 is very erroneous and unwarranted. Under the statutes, the "The U.S. Statutes at Large" are the legal evidence of laws (U.S. Code 1952, Tit. 5, Sec. 112) and not the U.S. Code (Tit. 5, Sec. 204).

As said in Blanc v. U.S., 140 F. Supp. 481, 482, "The aforesaid provision was enacted in 1945", said in reference to Sec. 793 of the Compensation Act.

The exclusion of review contained in the Act of 7/28/45 is contained at the end of a very long paragraph of said Act. (59 Stat. 503) Said paragraph deals exclusively with giving the Commission the following authority. In case payments of compensation are to be paid to persons who are "neither citizens nor residents of the United States, any Territory, or Canada", for injury occurring outside of the U.S. and the amount payable under the statute "is substantially disproportionate to compensation for disability *** payable in similar cases under local law" the Commission may change and modify the payment to be made so as to make it be in "accord with prevailing local payments in similar cases". In such cases the Commission may do this by changing the maximum amounts to be paid or the method of payments, or by changing the beneficiaries to receive the payments. And "in the cases of such non-citizens and non-residents the Commission" may make lump sum awards and may compromise and settle such claims. And in cases of such non-residents and non-citizens the Commission "may delegate to any officer, agency, or employee of the United States", authority to process and compromise and pay such claims. And should the Commission find that "conditions prevent the establishment

of facilities for processing and adjudicating claims of such non-citizens and non-residents", or that they are alien enemies, the Commission may "waive the application of this act, in whole or in part, and for such period or periods of time as the Commission shall fix." That the "provisions of this paragraph may be applied retrospectively" and "with such adjustment of compensation and benefits as the Commission may find to be proper". Then in the same paragraph treating exclusively with such non residents and non citizens of the United States the sentence appears, that the "action of the Commission or its designees in allowing or denying any payment under this Act shall be final and conclusive for all purposes and with respect to all questions of law and fact, and not subject to review by any other official of the United States, or any court by mandamus or otherwise, and credit shall be allowed in the accounts of any certifying or disbursing officer for payments in accordance with such action. Whereever used in this section, the geographical reference to the United States shall mean the continental United States".

The foregoing shows that the words "in allowing or denying any payment under this Act shall be final", refer exclusively to the Act of 7/28/1945 which enacted the said new very long paragraph to sec. 42 of the Compensation Act. That paragraph refers wholly and exclusively to the case of payments to be made to employees "who are neither citizens nor residents of the United States". Under the provisions of that paragraph the Commission in cases where the employees were neither residents nor citizens of the U.S. could change and apply the whole Compensation Act as it thought best. And in such cases only the exclusion for review is provided for, as a part of the same subject matter, i.e. dealing with indefinite payments to be made to non citizens and non residents. That Act of 7/28/45, when properly construed was not intended to give authority to the Commission to apply the Compensation Act in the normal case, in any way which it thought best, and its action

not be reviewed by the courts in the course of normal law.

The language of the Act of 7/28/45, "payment under this Act", has a meaning which is definite and precise. It means "payment" under the Act then being enacted, i.e. under "this Act", of 7/28/45.

The foregoing shows that there is no statutory exclusion of right to court review of any of the acts of the Appeals Board in this case.

POINT VI.

THE APPEALS BOARD HAD NO JURISDICTION TO REFUSE TO APPRAISE THE VALUE OF PLAINTIFF'S MAINTENANCE ON BOARD SHIP BEFORE HE WAS INJURED, AS PART OF HIS MONTHLY PAY.

On this item the Appeals Board said that "neither the Bureau nor the Appeals Board determine the value of subsistence and quarters" (App. 5, 36).

Section 762 (b) of the Compensation Act provides: "The value of subsistence and quarters, and of any other form of renumeration in kind for services if its value can be estimated in money, shall be included in the pay" (5 U.S.C.A. 762, 63 Stat. 862).

The Appeals Board simply refused to follow the statute and do its duty. It merely took the biased report of some unnamed employee of the U. S. Lines Co. who was apparently an insurance man, that the value of subsistence and quarters was only $1.20 a day, although every one connected with the case knew that said value was at least from $3. to $4. per day; and such value had been so adjudged by reported cases. Fraser v. U.S. (1944) 72 F. Supp. 1, 4, aff'd 167 F. 2d 141.

Clearly, the Appeals Board had no jurisdiction to refuse to follow the plain words of the statute, and appraise the value of this item of wages. The "Act for Judicial Review of Agency Action"

(5 U.S.C.A. 1009, 60 Stat. 243) expressly provides that the scope of the reviewing court shall include to "compel agency action unlawfully withheld or unreasonably delayed", as well as review whether the acts are based on substantial evidence or warranted by the facts.

CONCLUSION

The foregoing shows that the Appeals Board had no jurisdiction to act as it did in the matters presented in Points I to VI. The final judgment appealed from should be in all respects reversed, with a decree holding that the Appeals Board and the Secretary of Labor had no jurisdiction to hold that the said wages contracted for and paid as wages of the voyage were compensation under the act of 9/7/1916 paid in advance; and no jurisdiction to refuse to appraise the value of plaintiff's maintenance and quarters on board ship before he was injured, as part of his monthly wages. And that its acts in doing so are erroneous and reversed.

Respectfully submitted,

JESSE L. ROSENBERG
15 Park Row
New York 38, New York

WILLIAM C. KOPLOVITZ
938 Bowen Building
Washington 5, D. C.

Counsel for Appellant

February 1957

INDEX

	Record Page	Appendix Page
Complaint	1	1
Defendants' Motion to Dismiss	10	8
Brief of Plaintiff Opposing Motion of Defendants to Dismiss Complaint	11	9
Order Granting Motion to Dismiss filed October 16, 1956	52	44
Notice of Appeal filed December 11, 1956	53	44

[Filed May 18, 1956]

1 UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RAFAEL RIVERA, Triunfo St. #100 Fajardo, Puerto Rico Plaintiff, -against- JAMES P. MITCHELL, Secretary of Labor, and Appeals Board of the Employees Compensation Bureau, Defendants.	)	COMPLAINT No. 2108-56

This action includes one or more issues under the U. S. Constitution.

The plaintiff by his attorney complaining of the defendants, alleges:

FOR A FIRST CAUSE OF ACTION

1. Jurisdiction is founded on the existence of a question under the Act of September 7, 1916 (39 Stat. 750) U.S.C. Title 5. Secs. 793 and 1009, and the Act of June 11, 1946, Sec. 10, 60 Stat. 243.. And also under the Constitution of the U. S., Amendment V. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.

2. The plaintiff as a merchant marine seaman, on September 14, 1942 (during World War II) suffered very great personal injuries, and was totally disabled by enemy action, by being hit by an enemy missile, while performing duty on the gun deck of the S. S. NATHANIEL GREENE, a gallant ship, which was then in a convoy bound from Iceland to Murmansk, Russia, and was then under constant attack.

3. That the S. S. NATHANIEL GREENE was then a ship owned and operated by the U. S. Lines Co., a merchant marine shipping corporation.

That the U. S. Lines Co. was then an agency of the United States of America in the operation of said ship.

4. That by the contract contained in the Shipping Articles, signed by the captain and plaintiff and the rest of the crew, dated March 27, 1942, plaintiff contracted with the U. S. Lines Co., that the U. S. Lines Co. should insure plaintiff against personal injuries by enemy action, and should pay him as such insurance, $5,000 in case of total disability as defined in the insurance policy which was issued covering plaintiff and the rest of the crew. That said insurance was part of plaintiff's wages contracted for by plaintiff in the Shipping Articles. That said insurance contracted for as part of plaintiff's wages had nothing to do with any compensation under the U. S. Employees Compensation Act, (Act of 9/7/1916, and amendments) and was entirely separate from any such compensation. That in said contract contained in the Shipping Articles plaintiff as a seaman-wiper also contracted with U. S. Lines Co. for maintenance and cure, under the usual maritime seaman's contract, and for his wages back to home port, in case he should be injured. That said items contracted for (maintenance and cure and wages back to home port) were also a part of plaintiff's wages contracted for to be paid by U. S. Lines Co., and were at all times separate and apart from any claim for compensation under the U. S. Employees Compensation Act, and had nothing to do with any such compensation.

5. That in said contract of the U. S. Lines Co. contained in the Shipping Articles dated March 27, 1942, there was inserted by the Captain of the S. S. NATHANIEL GREENE and by plaintiff and his seamen's union, the National Maritime Union, a provision that the U. S. Lines Co.

3 agreed to pay to plaintiff insurance against war risk and war bonuses in amounts fixed by the Maritime War Emergency Board. Said provision reads as follows:

> "Agreed that war bonus payments and insurance will be paid in accordance with decisions of the Maritime War Emergency Board."

6. That said Maritime War Emergency Board was a Board appointed by the President of the U. S. consisting of three persons. That

the order of the President appointing said Board is dated December 19, 1941. That said order was made by the President after conferences between him and the seamen's unions and the shipping companies, and after a so-called Statement of Principles dated December 18, 1941 had been agreed to and signed by the seamen's unions and the shipping companies. That said Statement of Principles was an agreement that the President should appoint the Maritime War Emergency Board and that it should fix the insurance against war risks and the war bonuses which the shipping companies agreed to pay to the seamen as part of their wages. That plaintiff and plaintiff's union and the U. S. Lines Co. were parties to said contract contained in said Statement of Principles. That the Maritime War Emergency Board by its orders dated December 22, 1941 and February 6, 1942 fixed the war risk insurance which should be paid to plaintiff by the U. S. Lines Co. as part of the terms of his service contract at $5,000. in case of total disability, and that was part of the Shipping Articles, as above alleged.

7. That plaintiff as merchant seaman received from the U. S. Lines said insurance of $5,000 based on total disability by enemy action (after plaintiff had brought an action against U. S. Lines Co, to recover the same); and plaintiff also received from the U. S. Lines Co. as the ship owner, an amount of $577.50 for maintenance and cure, as an out patient, after long hospitalization; and plaintiff received from the U. S. Lines Co. $624.17 as wages back to home port. That all three of said items were received by plaintiff from the U. S. Lines Co. as payments of wages under plaintiff's maritime contract, and they were paid as such by U. S. Lines. And they had nothing to do with plaintiff's claim for compensation as a U. S. Employee under the U. S. Employees Compensation Act.

8. That plaintiff as such seaman was also an employee of the U. S. under the U. S. Employees Compensation Act of September 7, 1916 and amendments thereto. That plaintiff duly filed a claim dated May 2, 1946 for compensation under said Act, with the U. S. Compensation Commission, which was duly succeeded by the Bureau of Employees Compensation. That plaintiff duly appealed from certain acts of said Bureau

to the Appeals Board of the Employees Compensation Bureau, which is a part of the U. S. Department of Labor. That the Appeals Board has made a decision on plaintiff's appeal which covers matters over which the Appeals Board and the Department of Labor have no jurisdiction and which deprive plaintiff of vested property rights without due process of law under the U. S. Constitution. That said decision by the Appeals Board is a final departmental decision.

9. That in a decision by the Appeals Board dated March 20, ~~1946~~ 1950 the defendant, Appeals Board, has deducted as a set-off from compensation due to plaintiff under the Compensation Act, all of said items received by plaintiff as wages, i.e. all of said insurance, maintenance and cure and wages back to home port. That the Appeals Board has held in said decision that each of said payments by the U. S. Lines Co. of $5,000 of insurance, of $577.50 of maintenance and cure, and of $624.17 of wages back to home port, was "pro tanto" a payment to plaintiff of compensation under the Compensation Act.

10. That in holding plaintiff's insurance and wages, and parts thereof, as a seaman, to be a set-off from the compensation due to plaintiff under the U. S. Compensation Act, the Appeals Board has not acted "within the granted authority." It has not kept within its "statutory power." There is no provision of the Compensation Act which provides that the Appeals Board may set-off the vested contractual rights of a seaman, to insurance and wages, by deducting them from compensation under the Compensation Act, and holding that they are "pro tanto" payments of such compensation, when they were contracted for and paid as wages entirely separate from compensation under the Compensation Act. And much less is there any provision of the Compensation Act which makes such an illegal decision by the Appeals Board not reviewable by the Courts.

11. As said by Justice Reed in Social Sec. Brd. v. Nierotko, 66 Supr. Ct. R. 643 (1945): "Administrative determinations must have a basis in law and must be within the granted authority. *** An agency may not finally decide the limits of its statutory power. That is a judicial function."

In setti g off plaintiff's insurance and wages and maintenance (previously paid by the U. S. Lines Co.) from compensation due to plaintiff under the Compensation Act, the Appeals Board was not construing and applying the Compensation Act. It was seizing upon vested rights of plaintiff to insurance and wages and maintenance and admittedly deducting them from his compensation under the Compensation Act. If it could do that without having its errors and unlawful acts subject to court review, it could seize upon any U. S. Bond held or right earned by plaintiff by contract and set it off against his compensation under the

6 Compen. Act, without any court review. The insurance and wages and maintenance were wholly earned by plaintiff under contract, and are entirely separate, and were due and paid under contract without any regard to Compensation under the Compen. Act.

FOR A SECOND CAUSE OF ACTION

12. The Appeals Board went outside of its statutory authority in deciding that it would not attempt to find the value of the maintenance of plaintiff on the ship before the injury, which is admittedly a part of plaintiff's monthly pay at the time of the injury.

13. During the voyage from 3/27/42 to 9/14/42 (date of injury) plaintiff, besides his other pay, received maintenance on the ship, as does any other seaman. This maintenance is for the seaman his board and room. That the value of it goes into the computation of his monthly pay at the time of the injury is undisputed. This is very important both before and after Nov. 1, 1949, as of which latter date the Act of 10/14/49 excluded war bonuses from the monthly pay for compensation purposes.

14. The Appeals Board wholly refused to appraise the value of said maintenance of plaintiff on the ship, as part of his wages. The decision of the Appeals Board says:

> "Neither the Bureau nor the Board determine the value of subsistence and quarters. It is determined by the employing establishment. *** The Board can only be guided by the established rate for subsistence and quarters as appears of record as of date of injury and therefore finds no error in the Bureau's

use of the amount of $1.20 per day."

7 15. Thus the Appeals Board held that it would not determine the value of "subsistence and quarters," although it was part of plaintiff's monthly pay at the time of the injury. The Appeals Board held that it would not act to appraise the value of said subsistence and quarters. The War Shipping Administration had reported to the Bureau that this maintenance was taken by it at $36 per month. The Bureau took that $36 per month at 36/30 = $1.20 per day. The Bureau refused to tell the plaintiff or plaintiff's attorney where it got this figure of $1.20 per day, and plaintiff did not know where the Bureau obtained it until the time of argument on the appeal.

16. That maintenance and quarters before the injury consisted of very good food, which was being furnished to seamen in time of war, and under battle conditions; and quarters. The value of that part of plaintiff's wages was its reasonable value to plaintiff. That said value of maintenance and quarters was at least from $2.50 to $5 per day. That was the value of maintenance and quarters in the nature of things, and it is also shown by the reported cases.

17. That it was outside of the jurisdiction of the Appeals Board to refuse to appraise said part of the wages of plaintiff, which entered into plaintiff's monthly wages at the time of the injury. That instead of appraising the value to plaintiff of said maintenance and quarters the Appeals Board took merely the reported and concealed statement of $36 per month and $1.20 per day made by some undisclosed insurance man. That in doing so, the Appeals Board acted with the characteristic bias of the Bureau and the Board against the plaintiff which is evident throughout the entire case and record. That the Bureau and the Board never reported to the plaintiff and his attorney the statement of said insurance man, reporting that the value of said maintenance and quarters was only

8 $1.20 per day, but instead it kept that secret from the plaintiff and his attorney as is shown by the record.

WHEREFORE, the plaintiff demands judgment declaring that the Appeals Board had no jurisdiction and no power to render its decision dated March 20, 1956, so far as it sets off and deducts from compensation

due to plaintiff under the Compensation Act the items paid to plaintiff consisting of the insurance, the maintenance and cure as an out patient and the wages back to home port; and so far as said decision refuses to appraise the monthly value to Rivera of his maintenance and quarters on board the Nathaniel Greene during the voyage and prior to the date of the injury, Sept. 14, 1942. And that as to such matters said decision is erroneous.

And demands judgment that to the extent above enumerated said decision of the Appeals Board dated March 20, 1956 be and the same hereby is reversed.

And demands judgment that the plaintiff have such other and further relief as may be just and proper together with the costs and disbursements of this action.

Dated: May 11, 1956.

/s/ JESSE L. ROSENBERG, ESQ.
Counsel for Plaintiff
15 Park Row
New York 38, N. Y.

/s/ WILLIAM C. KOPLOVITZ, ESQ.
Counsel for Plaintiff
938 Bowen Building
815 15th St., N.W.
Washington, D. C.

9

STATE OF NEW YORK)
:SS:
COUNTY OF NEW YORK)

JESSE L. ROSENBERG, being duly sworn, deposes and says that he is one of the attorneys in the within action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

That the reason why this verification is made by deponent and not by the plaintiff is that deponent is one of the attorneys for plaintiff, and that plaintiff is not within the State of New York, and the matters alleged

in the complaint are known to deponent by reason of investigations and conversations made and had by deponent.

/s/ JESSE L. ROSENBERG

Sworn to before me this
11th day of May 1956

/s/ PHILIP I. ROSENBERG
Notary Public, State of New York
No. 31-3352300 Qual. in N.Y. co.
Term Expires March 30, 1957

---

10 * * * * * *

[Filed July 19, 1956]

MOTION TO DISMISS

Defendants move the Court to dismiss the action for the reason that the Court lacks jurisdiction of the subject matter of the action in that there is no justiciable right which could support application for the relief sought; for the further reason that this suit is in substance an action against the United States of America which has not consented to be sued in such matters and has not waived its immunity from suit; and for the further reason that judicial action in respect to the subject matter is forbidden by law, and no statutory authority exists under which the Court is empowered to hear and determine the subject matter of the complaint.

/s/ OLIVER GASCH
United States Attorney

/s/ ROBERT L. TOOMEY
Assistant United States Attorney

Attorneys for Defendants

STUART ROTHMAN
Solicitor of Labor
WARD E. BOOTE
Assistant Solicitor
HERBERT P. MILLER
JAMES EDWARD HUGHES
Attorneys
United States Department of Labor

Of Counsel

11 BRIEF OF PLAINTIFF OPPOSING MOTION OF DEFENDANTS TO DISMISS COMPLAINT.

[Filed Sep. 17, 1956]

* * * * * *

The Plaintiff asks for an oral argument. And because the issues on this motion cover the jurisdiction of both the defendants and of the District Court, Plaintiff asks that his attorney be allowed 30 minutes for oral argument. And plaintiff asks that the clerk of Court give notice of the date and time of argument at least one week in advance, so that plaintiff's attorney may come from New York to Washington to argue the motion.

* * * * * *

14 Introductory Statement

The defendants by notice of motion (not dated) move to dismiss this action on the alleged ground that the Court has no possible jurisdiction of the subject matter, and for other sequential reasons.

Defendants' memorandum (not dated) in support of said motion seeks to treat the complaint as a cause of action to review a decision of the Appeals Board and of the Labor Department made under the U. S. Compensation Act of Sept. 7, 1916. In such manner the defendants avoid or beg the issue, because Section 793 of the Compensation Act, as quoted by defendants, p. 2, precludes a Court review of the decisions made by the Appeals Board which are truly made by the Appeals Board under the Compensation Act.

But the Acts of the Bureau and of the Appeals Board complained of in the complaint, are Acts done by the Appeals Board which are outside of the jurisdiction and statutory authority of the Appeals Board. The Appeals Board seized upon $5000 of insurance which the seaman, Rivera, earned as wages and received as wages from the U. S. Lines Co. under contract with the U. S. Lines Co.; and the Appeals Board set off said

$5,000 of insurance, and took it from Rivera, by deducting it from moneys found by the Appeals Board to be due to Rivera as workmen's compensation under the Compensation Act of Sept. 7, 1916.

In that way the Appeals Board deprived Rivera of his said $5,000 without due process of law. The insurance which Rivera earned from, and was paid by, the U. S. Lines Co. was fully earned as seaman's wages under specific contract. And it had nothing whatever to do with workmen's compensation due to Rivera under the Compensation Act. And in using said insurance as a set off from the workmen's compensation due to Rivera, the Appeals Board acted outside of its jurisdiction and subject matter and outside of its statutory authority. The other acts complained of in the complaint stem wholly from the fact that the Appeals Board went outside of its jurisdiction in deciding certain matters against Rivera.

Thus the causes of action alleged in the complaint are not to review a decision made by the Appeals Board under the Compensation Act. They are to review a decision made by the Appeals Board only so far as the Appeals Board acted outside of its jurisdiction and outside of its statutory authority. The final decision of the Appeals Board dated March 20, 1956 contained several other decisions against Rivera which are unreasonable and unexplainable, except as showing some cant, but they were really made under the Compensation Act, and so they fall under said section 793, and they are not sought to be reviewed here.

The defendants cite many cases, and make much argument, to the point that where the Appeals Board makes a decision which is, without any issue, of such a kind and nature as to be made under the jurisdiction and authority of the Compensation Act, there is no right of Court review. There is no dispute in this action on that point. All of those cases and such arguments are not in point.

STATEMENT OF FACTS
THE ISSUES AND HOW THEY AROSE

The plaintiff, Rivera, was a Puerto Rican seaman, who shipped as wiper in the engineer's department, before he was totally disabled by the

16 injuries alleged herein. On the voyage herein he shipped as wiper on the SS. Nathaniel Greene which was owned and operated by the U. S. Lines Co.

The U. S. Lines Co. was, and still is, a privately owned shipping company. The SS. Nathaniel Greene was a ship of the U. S. Lines Co. which it owned and operated at all times mentioned herein.

At New York on March 27, 1942 Rivera signed on as a seaman and wiper on the Nathaniel Greene. He signed the Shipping Articles contract with the Captain and the rest of the crew. The Shipping Articles were those of the U. S. Lines Co. The seamen signed on as seaman of the U. S. Lines Co.

It is to be noted that the U. S. Lines Co. was then, and still is, a privately owned shipping corporation. The words "United States" in the name of the "U. S. Lines Co." do not mean, or connote, that the corporate entity was anything but a private corporation, and there is no other idea in the case.

In the Shipping Articles the U. S. Lines Co. expressly contracted to pay to Rivera wages which were classified, in part as general wages, in part as war bonus payments, and in part as insurance of $5,000 in case he was totally disabled by enemy action. The Shipping Articles expressly provided that the amount of the war bonus payments, and of the insurance should be fixed by the Maritime War Emergency Board. Said Board had been created on Dec. 19, 1941 for that purpose under an agreement between Rivera's labor union and the U. S. Lines Co. and others. Said Board was not connected with the War Department. Said Board did fix the amount of said war bonus payments and insurance.

On Sept. 14, 1942 the Nathaniel Greene, was in waters east of England, in a large convoy of ships going from Iceland to Murmansk, Russia, loaded with war materials. The convoy was under constant attack and suffered many losses. At 3:30 p. m. on Sept. 14, 1942, Rivera was hit by a missile from an explosion caused by an enemy bomber.

17 Rivera was totally disabled. A great part of his left shoulder and left arm were shot away and lost. He was so hit while assigned to, and

doing, duty on a gun deck platform built above the main deck of the Nathaniel Greene, and passing ammunition to an anti-aircraft gunner.

For the time from March 27, 1942 to Sept. 14, 1942 the U. S. Lines Co. paid to Rivera wages, as general wages, and war bonus wages, and insurance of $5,000 as wages. Later, after he was injured, the U.S. Lines Co. paid to Rivera an amount of seaman's maintenance while he was being treated at a hospital as an out-patient, and paid him his wages back to home port of New York. Each of these items and their amounts are separately treated later herein under the Point headings.

It so happened that at that time Rivera was as seaman entitled to compensation as a U. S. employee under the Federal Compensation Act of Sept. 7, 1916. That was wholly unknown to Rivera at the time of his said voyage. He filed a claim for employee's compensation under said Act. The Appeals Board of the Employee's Compensation Bureau has found that Rivera is entitled to amounts of compensation under said Act of Sept. 7, 1916.

Said wages including insurance earned from and paid by the U. S. Lines Co. had nothing to do with employee's compensation under said Act.

The Appeals Board has seized upon and set off and deducted from the compensation so found to be due to Rivera, the contract wages which Rivera earned from, and was paid by, the U. S. Lines Co., so far as said wages consist of said insurance of $5,000; and said payments of seaman's maintenance as an out-patient; and said wages back to home port, after the injury. And the Appeals Board has wholly refused to appraise and evaluate the wages paid to Rivera by the U. S. Lines as maintenance on board the Nathaniel Greene during the time before he was injured, from 3/27/42 to 9/14/42, as part of his monthly pay.

18 In the said part of its decision and set offs, the Appeals Board has acted outside of its jurisdiction and statutory authority. It is well settled that where the Acts of an administrative agency are done outside of its jurisdiction and statutory authority said acts are subject to Court review.

The complaint herein contains the proper allegations for a Court review of said acts and set offs made by the Appeals Board outside of its jurisdiction.

The other facts will be presented in the Points.

POINT I.

THE INSURANCE OF $5000 AGAINST ENEMY ACTION WAS EARNED FROM, AND WAS PAID BY, THE U. S. LINES CO., AS CONTRACT WAGES, AND IT WAS FULLY EARNED ON THE DATE OF THE INJURIES, SEPT. 14, 1942. AND AS INSURANCE UNDER THE WAGES CONTRACT WITH THE U. S. LINES CO., IT IS NOT INSURANCE BY THE WAR DEPARTMENT.

On March 27, 1942 the SS. Nathaniel Greene was in N. Y. harbor, at a pier on the Hudson River. It was being owned and operated by the U. S. Lines Co. in the name of U. S. Lines Co. and by a Captain and crew of the U. S. Lines Co..

Rafael Rivera, an immigrant Puerto Rican seaman, was then sent by his union (National Maritime Union) from the hiring hall of that Union to the Nathaniel Greene, as a prospective seaman for the voyage. Rivera went to the ship and met the ship's officers and signed on as "wiper", which is a job in the engineer's department. The job of "wiper" is in substance that of a laborer on the ship. In grade it corresponds to "coal passer".

Rivera signed the Shipping Articles of the ship, which are dated March 27, 1942 and are signed by the Captain of the ship and all the other members of the crew. And in the Shipping Articles are stated various matters of the contract with each member of the crew. The Shipping Articles, among other matters, stated the name, age, address,
19 nearest relative, the kind of service hired for, the rate of wages hired for, of each member of the crew. The Shipping Articles read that the contract was with the U. S. Lines Co. and the Captain signed the Shipping Articles as the Captain of the ship, the Nathaniel Greene, and representing the U. S. Lines Co.. The Shipping Articles contain no

mention of the U. S. Government or of the War Administration.

The Shipping Articles contained the provision that the voyage would be "to any port in the world including all ports of Europe", and that the voyage would last "not exceeding 12 months". The Shipping Articles provided that the seamen "would carry out and perform all proper orders of the Master".

THE SHIPPING ARTICLES CONTRACT CONTAINS THE SPECIAL CONTRACTUAL PROVISIONS AS FOLLOWS: "IT IS FURTHER AGREED THAT WAR BONUS PAYMENTS AND INSURANCE WILL BE PAID IN ACCORDANCE WITH DECISIONS OF THE MARITIME WAR EMERGENCY BOARD".

Said provisions of the contract were made after much negotiations between the seamen's unions, including Rivera's union, and the shipping companies, including the U. S. Lines Co. . . These negotiations are matters of public record. An outline statement of them is as follows.

The U. S. had just entered World War II on Dec. 7, 1941. Ships like the Nathaniel Greene were to be sent in convoys to Murmansk, Russia (around the Scandinavian Peninsula) and other places in Europe, loaded with war materials. The ships were armed with anti-aircraft guns placed on large platforms raised fore-and-aft above the main deck. They carried some navy men to operate the guns. The mariners, like Rivera, would not be in the armed service where they could receive pensions and payments for war injury and death under the laws applicable to navy men. The war risks to some of the mariners, including Rivera, was greater than that of the navy men on the ship, who worked inside of concrete turrets on the gun decks.

The unions were in a position to dictate the war risk wages and war risk insurance under which the mariners would contract to serve. The mariners were not drafted men. There was very great threat and emergency that the unions would dictate their own war wages and war risk insurance. There were conferences on the matter in Washington between the unions, the shipping companies, and the President and the President's office. They all worked out and developed and put in opera-

tion the following plan, to operate in the emergency.

The seamen's unions and the shipping companies drew up and signed an agreement called a "Statement of Principles" dated Dec. 18, 1941, which provided that a Maritime War Emergency Board should be created to prevent "interruption of service or stoppage of work during the period of the war", and for "settling questions relating to war risks compensation and insurance". The President then by an order dated Dec. 19, 1941 appointed the "Maritime War Emergency Board", consisting of John R. Steelman, Edward Macauley and Frank P. Graham. Said order recites that it is made: "Pursuant to the agreement reached on Dec. 19, 1941, between representatives of the maritime industry and the labor organizations involved, and in accordance with their joint request that a Board to expedite and coordinate the war efforts of the maritime industry be appointed". Said order provided that the "powers and purposes (of the Board) shall be those set forth in accordance with Exhibit A of the agreement referred to above". Said order is printed at Fed. Register, 1943, Vol. 8, Pt. 3, p. 3385; and also at Code of Fed. Reg. Cumulative Sup. 1943, Title 3, President, p. 1327. The Exhibit A of the agreement referred to in said order is the Statement of Principles dated Dec. 18, 1941, signed by the labor unions and the shipping companies and also by "E. S. Land Administrator, War Shipping Administration". Said agreement dated Dec. 18, 1941 and said Exhibit A thereof is printed in Fed.
21 Regis. 1943, p. 3454.

The Maritime War Emergency Board published its interim Decision No. 1, dated Dec. 22, 1941 at 11:50 p.m.. Said decision provides among other matters:

> "Effective immediately and pending further consideration and decision by the Board each member of the crew of any merchant vessel documented under the laws of the United States and covered by the Statement of Principles pursuant to which the Board has been established, including such vessels now at sea, shall be insured

against loss of life due to risks of war or warlike operations in the amount of $5,000 on all voyages such insurance to be effective throughout the entire voyage.

****

"This is an interim decision made to govern the relations of the operators and their employees in the emergency pending further consideration and, if necessary, revision.

****

"The Board will endeavor to arrive, after careful consideration, at a prompt determination on all matters properly pending before it, it being intended that its decision thereon will be retroactive to Sunday, December 7, 1941, unless otherwise determined by the Board.

****

"At a meeting of the Maritime War Emergency Board on December 23, 1941 the following was agreed upon as part of interim decisions: 'Bonus rates will be established as promptly as possible and shall be for the danger zones recognized by the Board's interim decision with reference to insurance.' "

22

Attached to said interim decision No. 1, is a copy of the Statement of Principles, being, on 7 printed pages, the contract and the signatures, which was made dated Dec. 18, 1941 between the labor unions and the shipping companies, and on which the President appointed the Maritime War Emergency Board by his order dated Dec. 19, 1941, set forth supra.

Said interim decision No. 1, shows how the Board acted quickly to implement the contract. But said interim decision showed that more details were to follow. And so on Feb. 6, 1942 the Board made and published a Supplement to its Decision No. 1.

Said decision of Feb. 6, 1942 provides in part:

"This decision supplements Decision No. 1 and provides benefits for loss of life and bodily injury to Master, Officers and Crew directly occasioned by war-like operations or through accidental causes during internment.

"In this Supplement to Decision No. 1 the Board rules that war risk insurance be in accordance with the terms of the policy herewith attached and approved, on and after February 7, 1942.

"This decision applies to all parties affected by Decision No. 1." (That is, to Rivera and all seamen covered by the said contract of Dec. 18, 1941.)

Said Decision of Feb. 6, 1942 contained a complete policy of insurance printed on 4 legal size pages and signed by each of the 3 Board members: "Edward Macauley, Chairman, Frank P. Graham, John R. Steelman".

Said complete insurance policy presented by the Board to implement the contract provides in the parts material herein as follows:

23 "(named insurer) in consideration of the payment of the premium of $, being % of the sum insured hereunder, does insure (the shipping company) for the account of the Master, Officers, and Crew of the American vessel called (Nathaniel Greene or other vessel to be named) during a voyage commencing on or about (date to be filled in) at and from (voyage to be described) for Dollars ($) (payable in case of claim in accordance with the following schedules and in funds current in the United States).

****

"Against loss of life and bodily injury to the master, officers, and crew *** directly occasioned by *** war-like operations.

****

"Against (p. 2) loss of life and bodily injury to the master, officers, and crew *** directly occasioned by *** war-like operations *** and acts of *** peoples in prosecution of hostilities ***.

"Schedule One. *** Members of crew at $5000 each. *** The amount for which each person is covered, according to this schedule, is hereinafter referred to as the principal sum.

****

"For accidental bodily injury not described in Schedule Two (Schedule Two is not material here) which, within 90 days from the date of accident from a cause hereinbefore set forth, results in total disability and which necessarily and continuously prevents the person injured from performing any and every kind of duty pertaining to such person's occupation, the Assurer will pay compensation in monthly installments at the rate of 2% of the principal sum, beginning with the date of return to a port within the Continental United States, during such time thereafter as the total disability persists or until such time as the total compensation, so paid, shall amount to the principal sum provided for the injured person in Schedule One."

At the end of this prescribed form of insurance policy is affixed the signatures of each of the members of the Maritime War Emergency Board.

As pointed out in McCormick v. Moore-McCormack Inc. 54 Fed. Sup 399, the form of policy presented by the Board, did not require the shipping company to insure with any particular insurance carrier. It left it open to the shipping company to be its own insurer, or to insure with any insurance carrier. But the Board prescribed the complete form of policy by which each member of the crew must be insured against the risks from injury by war action. This was as provided for

in the contract between the unions and the shipping companies dated Dec. 18, 1941, called the "Statement of Principles", to fulfill the purposes of which the Maritime War Emergency Board was appointed by the President.

Said Statement of Principles contract provided in part: That it was made "without waiving the right to strike"; and that "collective bargaining will be retained and all agreements and obligations arising as a result of collective bargaining agreements will in no way be violated". But that: "Under the present war conditions, however, neither the unions nor the steamship operators will at all times be in a position to obtain adequate information with regard to the extent of the war risks in order to enable them to bargain intelligently with regard to the questions relating to war risk compensation and insurance of the personnel of the vessels (Italics ours)".

And so the contract provides for the creation of the Maritime War Emergency Board to study the matters and make decisions and findings as an arbitrator as part of the contract (Board Dec. No. 1; U. S. Register, 1943 Vol. 8, Pt. 3 p. 3454).

A Decision No. 2 of the Board dated Jan. 10, 1942 fixed the war bonus payments which should be paid to Rivera as part of his wages due from U. S. Lines Co. under the Shipping Articles contract. It is undisputed that these war bonus payments were part of his wages under the Shipping Articles. So it is inconsistent to claim, as the defendants do claim, that the insurance of $5000 was not also fixed by the Board as part of his wages under the Shipping Articles contract. The war bonus payments were of 2 kinds. One of them was a voyage bonus which was due while the Nathaniel Greene was in certain war zones. The other kind was a port bonus which was due for the war risk when the ship entered certain ports in war zones.

Said Decision No. 2 of the Board dated Jan. 10, 1942 provided that for ships on a transatlantic voyage, as was the Nathaniel Greene, a war voyage bonus should be paid which was 100% of the total monthly rate of compensation but not less than $100 a month. Said decision also

provided that for ships entering a port in the United Kingdom a port bonus of $100.00 should be paid; and that for ships entering a port in Iceland a port bonus of $60.00 should be paid. Under these provisions for war bonus payments, fixed by the Board, Rivera was admittedly paid $833.33 by the U. S. Lines Co., as part of his wages, for the time from March 27, 1942 to Sept. 14, 1942. This is undisputed. Since the Board fixed that war bonus part of his wages which were due from the U. S. Lines Co. under the Shipping Articles, of course the Board in fixing the insurance of $5000 as due from the U. S. Lines under the Shipping Articles, fixed also another part of his wages which were due from the U. S. Lines Co.

The foregoing shows that Rivera signed on the Nathaniel Greene as a seaman with the Captain and the rest of the crew in the usual way. And that the Shipping Articles were exclusively those of the U. S. Lines Co. which owned and operated the ship. And that the Shipping Articles
26 were a contract specifying the wages of Rivera as the conditions of his service and employment. And the foregoing shows as matter of law, by undisputed facts, that the $5000 of insurance in case of total disability by enemy action was a part of Rivera's wages earned by him from the U. S. Lines Co. as his employer.

The facts are wholly undisputed that after Rivera was injured by enemy action on Sept. 14, 1942, and after he was hospitalized until Aug. 6, 1943, the U. S. Lines Co. found him to be totally disabled under the terms of the insurance policy of Maritime War Emergency Board. And that the U. S. Lines Co. paid to Rivera the $5000 of insurance. Said payment was made at the rate provided for in the policy, that is, 2% of $5000, which is $100, per month. The payments of $100 per month were taken as accruing at the end of each month for the 50 months, including the 50 months from Jan. 26, 1943 to Feb. 27, 1947, both months included.

The foregoing shows that Rivera earned from the U. S. Lines Co. as wages the insurance of $5000. That he received said $5000 as wages paid by the U. S. Lines Co.

Whatever contract the U. S. Lines Co. had with the War Department

was no concern of Rivera. It was wholly unknown to him, and it was not any part of his contract of service on the Nathaniel Greene, as wiper for the U. S. Lines Co.

POINT II.

WHETHER IN ANY CASE AN ADMINISTRATIVE AGENCY HAS ACTED OUTSIDE OF ITS JURISDICTION PRESCRIBED BY STATUTE, IS A MATTER FOR COURT REVIEW. THE APPEALS BOARD HAD NO JURISDICTION TO ELIMINATE THE CONTRACT WAGES EARNED BY RIVERA FROM THE U. S. LINES CO. AND PAID TO HIM.

In Social Sec. Brd. v. Nierotko, 327 US. 358, 369, Mr. Justice Reed says:

> "Administrative determinations must have a basis in law and must be within the granted authority. *** An agency may not finally decide the limits of its statutory power. That is a judicial function."

No one would argue that the Appeals Board has jurisdiction to make a non reviewable order that a man be hanged; or that a victory bond owned by Rivera be set off against his employee's compensation; or that ordinary wages or war bonus payments earned by Rivera before his injury be set off against his employee's compensation. In the same way the Appeals Board has no jurisdiction to make a non reviewable order that insurance earned by Rivera as wages be set off against his employee's compensation; and much less, to order that insurance earned by Rivera from the U. S. Lines Co. and paid to him by it, be set off against his employee's compensation.

It is a matter of common sense and logic, in the nature of things, that past wages earned before the injury and paid, are a different subject matter from employee's compensation under the Compensation Act of Sept. 7, 1916.

Webster's New International Dict. 1923, defines "Workmen's Compensation Act" as "a statute *** giving to a workman *** a right against his employer to a certain compensation on the mere occurrence of an accident."

It defines "Insurance" as "A contract whereby, for a stipulated consideration, called a premium, one party undertakes to indemnify or guarantee another against loss by a certain specified contingency or peril, called a risk".

The Act for judicial review of agency action provides for judicial review of "any agency action", "except so far as statutes preclude judicial review". And provides that such review may be by "any applicable form of legal action (including actions for declaratory judgments). And provides that such review shall include, among other matters, whether the agency action was "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" .(5 U.S.C. 1009). Such a review was by action at law in Nierotko v. Soc. Sec. Brd. 327 U.S. 358, 149 F. 2d 273. Of course no statute precludes review of agency action where the agency acts outside of its jurisdiction. Sec. 793 of the Compen. Act excluding judicial review does not apply because the Appeals Board
28 acted outside of its jurisdiction in setting off contract wages earned from and paid by U. S. Lines Co. from workmen's compensation.

The foregoing shows that the insurance earned from and paid by the U.S. Lines Co. as part of his war wages, was a different subject matter from Rivera's claim for compensation under the Act of 9/7/16, and that the Appeals Board had no jurisdiction to set off earned wages against workmen's compensation, and that its act in doing so is subject to Court review.

POINT III.

CONGRESS HAS EXPRESSLY PROVIDED BY STATUTE THAT INSURANCE IS A SUBJECT MATTER WHICH IS SEPARATE FROM COMPENSATION UNDER THE ACT OF SEPT. 7, 1916.

Congress amended Sec. 7 of the Compensation Act, by an Act of 7/1/44, Sec. 605 (58 Stat. 712). By said amendment Congress provided that if an employee should be entitled to receive benefits for an injury under two compensation acts he should elect between them, but that this provision should not apply to "the proceeds of any insurance policy".

Said amending act of 7/1/44 Sec. 605 added a new clause to Sec. 7

of the Compensation Act which reads:

> "Provided, That whenever any person is entitled to receive any benefits under this Act by reason of his injury, *** and is also entitled to receive from the United States any payments or benefits (other than the proceeds of any insurance policy), by reason of such injury *** under any other Act of Congress, because of service by him *** as an employee *** such person shall elect which benefits he shall receive."

Said quotation provides that when an employee is required to elect between statutes, no such election is required as to the proceeds of any insurance policy. It says in substance that the proceeds of any insurance policy is a separate subject matter from benefits under the Compensation Act. That it requires no election, and makes no conflict.

29 Not only does said amendment provide that insurance, in general, is a subject matter separate from statutory compensation, but in the present case, Rivera's insurance was by the U. S. Lines Co., another entity, his employer, and it was contracted for and paid as part of his wages under the Shipping Articles. It was payable as wages if no Compensation Act had ever existed; and if the seaman had not at that time been a citizen, or he was not qualified to claim under the Compensation Act for some other reason. The insurance was fully earned and accrued on 9/14/42, when he was injured. Compensation under the Compensation Act could not accrue until 3 days after 9/14/42. Insurance, would not sensibly be insurance if it could be charged back to him. In such case it would not insure against the war risk and the loss suffered, in any sense.

The foregoing shows that Rivera's insurance of $5000 by the U.S. Lines Co. as part of his wages, was simply another matter from his statutory compensation under the Compensation Act; and shows that the Appeals Board had no jurisdiction over it; and no jurisdiction to seize on his said insurance and use it as a set off against his said compensation.

POINT IV.

THE $577.50 WHICH U. S. LINES CO. PAID TO RIVERA FOR MAINTENANCE AS AN OUT-PATIENT WAS EARNED FROM, AND PAID BY, U. S. LINES CO. AS PART OF HIS CONTRACT WAGES. AND THE APPEALS BOARD HAD NO JURISDICTION OR RIGHT TO SET IT OFF AGAINST COMPENSATION DUE HIM UNDER THE COMPENSATION ACT.

Rivera as a seaman duly signed on, and duly served, under the Shipping Articles of the Nathaniel Greene. In such service, on Sept. 14, 1942, he received very severe injuries totally disabling him. Under his maritime contract he was entitled, after his hospitalization, to maintenance as an out-patient while he was being further treated at a hospital to try to effect such cure as could reasonable be expected. He was entitled by contract to this maintenance by the U. S. Lines Co. as the operator of the ship and his employer under the Shipping Articles.

It is thoroughly settled and can not be disputed that under his seaman's maritime contract contained in the Shipping Articles, Rivera was entitled to be paid by the U. S. Lines Co. his maintenance during the time he was being furnished hospital treatment as an out-patient to effect a reasonable cure. Calmar v. Taylor, 303 U.S. 525, 528-9. 1 Benedict Admir. 253-4. That obligation by the U. S. Lines Co. has never been disputed in the case.

The U. S. Lines Co. furnished to Rivera hospital treatment in hospitals in the United Kingdom, and on board ships. And it shipped Rivera back to New York, so that he arrived at the home port of N. Y. on Dec. 26, 1942. Then from Dec. 26, 1942 to Aug. 14, 1943 (a period of 231 days) the U. S. Lines Co. furnished hospital treatment to Rivera as an out-patient. For this period of 231 days the U. S. Lines Co. paid to Rivera maintenance at a rate of $2.50 per day. Said $2.50 per day was a low rate, even in 1942, but it was then agreed to by Rivera and his attorney. Said maintenance was paid by the U. S. Lines Co. to Rivera in parts which totaled, $2.50 x 231 — $577.50.

Said payment of $577.50 by the U. S. Lines Co. was obviously, and as matter of law, paid as part of the wages contracted for and due under the Shipping Articles. The Appeals Board seized upon said payment of $577.50 as wages and set it off from the workmen's compensation found due to Rivera under the Act of 9/7/16. In making said set off the Appeals Board clearly had no jurisdiction and statutory authority to do so. Its action in doing so is subject to Court review and reversal. The Appeals Board had no jurisdiction over wages earned and paid by contract, to use them as a set off against workmens compensation admittedly due under the Act of 9/7/16.

31

POINT V.

RIVERA EARNED FROM, AND WAS PAID BY, THE U. S. LINES CO. HIS CONTRACT WAGES BACK TO HOME PORT, AFTER HE WAS INJURED. THE APPEALS BOARD HAD NO JURISDICTION TO SEIZE UPON SAID WAGES AND MAKE THEM A SET OFF AGAINST COMPENSATION FOUND TO BE DUE UNDER THE COMPENSATION ACT OF 9/7/16.

In Calmar v. Taylor, 303 U. S. 525, 527-9, it was held (Stone J.) that the "duty of a vessel and her owner to provide maintenance and cure for seamen injured or falling ill while in service *** arises from the contract of employment," and is not restricted to cases where there is "negligence or culpability on the part of the owner or master *** nor is it restricted to those cases where the seaman's employment is the cause of the injury or illness. *** It is not an award of compensation for the disability suffered. *** The maintenance exacted is comparable to that to which the seaman is entitled while at sea, *** and 'cure' is care, including nursing and medical attention during such period as the duty continues". It was there held that the duty of maintenance and care by the master and owner under the contract, extended for a reasonable time after the seaman had been returned to home port, in which to effect such cure as could be had.

It is elemental law that the Shipping Articles are a contract, under which an injured seaman is entitled to his full wages back to home port;

and that said wages back to home port are, as held in the Calmar case, "not an award of compensation for the disability".

So held in the following cases:

> "The ship's articles constitute a contract between the seaman and the ship for wages, maintenance, and cure for illness during the voyage. After entering upon the voyage, the seaman became entitled as of course, during the voyage to (a) maintenance, (b) cure for illness, (c) wages for the voyage."
> (Neterer D. J. in The Progress, 21 F. Supp. 572.)
> 32 "The Appellee (a seaman) having falling sick on the voyage, was entitled to recover his full wages for the trip for which he was engaged, and the necessary expense incurred for his cure." (Gilbert C. J. in Pacific Mail Co. v. Lucas, 264 Fed. R. 938, 941; aff'd 258 U.S. 266.)

The Shipping Articles are a "maritime contract" to pay a seaman's wages to the end of the voyage. So held in Martinez v. Matson Co. 97 Fed. 2d, 19; Great Lakes Co. v. Geiger, 261 Fed. R. 275.

Thus as matter of law Rivera had a maritime contract with the Nathaniel Green and the U. S. Lines Co. to pay him his full wages back to N. Y. i.e. for the time from 9/14/42 to 12/26/42. All parties acted on that basis. The U. S. Lines Co. paid to Rivera his wages back to home port of N. Y. for the time from 9/14/42 to 12/26/42, in the sum of $624.17, as matter of course.

Said wages of Rivera were paid by U. S. Lines Co. as matter of contract. The payment of wages was for contract service by Rivera which he had fully performed and completed on 9/14/42. Rivera could not, and did not, render any services after 9/14/42, when he was injured.

Compensation under the Act of 9/7/16 could accrue only after 9/14/42 and after a 3 days of waiting period, so as to begin on 9/18/42.

The Appeals Board clearly had no jurisdiction to seize on these $624.17 of wages, earned from and paid by, U. S. Lines Co., for work

done prior to 9/14/42, and use them as a set off against compensation under the Act of 9/7/16, as if said wages had been workmen's compensation paid under the Act of 9/7/16. In doing so the Appeals Board clearly acted outside of its jurisdiction and statutory authority. It was only by doing so, that the Appeals Board made the compensation under the Act of 9/7/16 begin on Dec. 30, 1942 instead of 9/18/42 which is 3 days after the injury, as the Compensation Act then expressly provided in Section 2. The Appeals Board paid Rivera no compensation under the Compensation Act for time before 12/30/42 because it set off said $624.17
33 of wages back to home port against compensation, which it had no jurisdiction to do, because the Appeals Board had no jurisdiction over wages which had been earned from the U. S. Lines Co. by services completed before the injuries were received. Said act by the Appeals Board done without jurisdiction is reviewable by the Court.

POINT VI.

RIVERA'S RIGHT TO HIS CONTRACT WAGES FROM THE U. S. LINES CO., INCLUDING INSURANCE, MAINTENANCE, AND WAGES BACK TO HOME PORT, WAS A SEPARATE MATTER FROM HIS RIGHT TO COMPENSATION UNDER THE ACT OF 9/7/16. CONTRACT WAGES, AND COMPENSATION ARE DISTINCT FROM EACH OTHER. THE JURISDICTION OF THE APPEALS BOARD OVER COMPENSATION, GAVE IT NO JURISDICTION TO DEPRIVE RIVERA OF SAID CONTRACT WAGES. IT DID SO WITHOUT DUE PROCESS OF LAW UNDER THE U. S. CONSTITUTION.

It is obvious that when Rivera, as a seaman, signed the Shipping Articles, the U. S. Lines Co. as the owner and operator of the ship contracted to pay him the entire wages due under his maritime contract. These wages expressly included his so-called basic wages of $87.50 per month; the war bonus payments being the voyage and port bonuses paid to him for the war risks; and the $5000 of insurance against total disability by enemy action. And these wages also included by operation of law, his hospital treatment; his maintenance as an outpatient; and his

wages back to home port. All of these items were contracted for, and paid by the U. S. Lines Co.. The Appeals Board has gone out of its jurisdiction and deprived Rivera of those parts of his contracted wages which were the insurance of $5000 against war risks; the $577.50 of maintenance as an out-patient; and his wages back to home port, of $624.17.

Rivera's contract was solely with the U. S. Lines Co. and the ship. Whatever relation there was between the War Department and the U. S. Lines Co., it was not asked or stated, and was wholly unknown to Rivera. It was no part of Rivera's contract, which includes the clause

34 "It is further agreed that war bonus payments and insurance will be paid in accordance with decisions of the Maritime War Emergency Board".

The Courts have adjudged that the contract of the seaman in such cases is entirely separate from any possible claim which he may have against any other party which was connected with the shipping company; and that the seaman's contract in the Shipping Articles is separate and distinct from any contract of the Shipping Co. with any other party.

In McCormick v. Moore-McCormack Lines Inc. 54 Fed. Sup. 399, A.M.C. 1943, the seaman shipped with the operating shipping company at the time when the order of the Maritime War Emergency Board was in operation, which provided, as in the Rivera case, that a seaman should be insured against injury by enemy action to the extent of $5000. It was held that the primary right of the seaman was by contract with the shipping company for the insurance and the maintenance as part of his wages. Ganey J. p. 400-1, says:

> "The duty here stems from the obligation imposed on the operator of the vessel to see that each member of the crew is insured against loss of life and bodily injury in the amount of $5000 on all voyages. The restriction does not impose any specific company with whom the operator of a vessel may place the insurance. In other words, it is possible under the duty imposed for the operator of a vessel to be a

self-insurer, to insure in a private company or to insure with the United States. *** The primary remedy of the plaintiff is against the employer who is immediately responsible for the insurance and I see no reason why this right should be relinquished merely because he has a similar right against the United States."

35 Again p. 401:

"The origin of maintenance and cure is contractual in nature and is imposed as a duty annexed to the employment." (Citing Cortes v. Baltimore Ins. Line 287 U. S. 367) "It suffices here to say that even under the general agency agreement the operator became owner pro hac vice, and accordingly became subject to the same liability."

The McCormick case clearly holds, as m tter of course, that the insurance and the maintenance are part of the wages contract with the shipping company under the Shipping Articles. It is very strange, indeed, that the Appeals Board, could ever have wholly ignored this, which it did.

And in the present case, it should be noted that the Shipping Articles contract says: "It is further agreed that war bonus payments and insur ice will be paid (not merely insured) in accordance with decisions of the Maritime War Emergency Board".

In Fostor v. Marine Lines 74 F. Sup. 53, the injury occurred on July 5, 1943, which was after a further order had been made by the Maritime War Emergency Board dated Jan. 28, 1943. Said further order provided that as to an injury occurring after March 15, 1943, if the shipping company had procured the insurance on the seaman from the War Shipping Administration, its obligations to furnish such insurance should be deemed to be fulfilled (55 F. Sup. 963, note). In the Foster case it was shown that the Marine Lines had duly procured such insurance from the War Shipping Administration, and the injury being after 3/15/43 it was held that it was not liable further, on account of insurance, and that

the seamen must proceed on the policy. It was assumed that this policy was part of the seaman's wages, as indeed it was. There was no claim that the policy was not wages, or that it had anything to do with compensation under the Act of 9/7/16.

In the present case the U. S. Lines Co. paid the insurance. It can not really be disputed that the insurance, maintenance and wages back
36 to home port, were each included in the seaman's contract for wages, made by Rivera with the U. S. Lines Co. in the Shipping Articles.

As said by Justice Douglas in Hust v. Moore McCormack, 328 U.S. 735, "The Shipping Articles, however, are by statute required to be an engagement between the master and crew. (38 Stat. 1168, 46 U.S.C. Sec. 713)"

The Act of 10/14/49, Sec. 206, amended Sec. 12 of the Compensation of 9/7/16, so as to provide that after Nov. 1, 1949, in computing compensation based on monthly pay:

> "bonus or premium pay for extraordinary service (including amounts paid as bonus for particularly hazardous service in time of war) shall not be taken into account".

Thus Congress legislated in effect that war bonus payments were wages of seamen for all purposes until Nov. 1, 1949, and that after Nov. 1, 1949, for compensation purposes only they should not be included as part of the wages. And note, that in this case the same contract clause which provides for this insurance, also provides for the war bonus payments. And the war bonus payments being admittedly part of the wages, the insurance also must be a part of the wages.

In Brady v. Roosevelt S.S. Co. 317 U.S. 575, it was held (and stated in the head note) that a private corporation operating a ship owned by the U. S. Maritime Commission, is liable for a marine tort arising out of the operation of the ship, even though by contract the Commission is required to indemnify said corporation against such loss. And such corporation being liable for such marine tort, must of necessity be liable for its own contract for wages made with the seamen. And in this case so far as the Shipping Articles contract shows the U. S. Lines Co. was operating the Nathaniel Greene as its own ship.

The foregoing shows that the wages included the insurance, maintenance and the wages back to home port of N. Y. And shows that the wages are an entirely different matter from compensation under the Act of 9/7/16. And shows that the Appeals Board having jurisdiction only
37 over compensation under the Act of 9/7/16 had no jurisdiction to eliminate contract wages earned from, and paid by, the U. S. Lines Co. And in doing so the Appeals Board acted outside of its jurisdiction and its acts in so doing are subject to Court review herein.

POINT VII.

STATEMENTS CONTAINED IN THE DECISION OF THE APPEALS BOARD SHOW THAT THE INSURANCE, MAINTENANCE AND WAGES BACK TO HOME PORT, ARE ALL CONTRACT WAGES WHICH WERE EARNED FROM THE U. S. LINES CO. AND WHICH ARE A SEPARATE SUBJECT MATTER FROM COMPENSATION UNDER THE ACT OF 9/7/16, AND ARE A SEPARATE MATTER OVER WHICH THE APPEALS BOARD HAS NO JURISDICTION.

The decision of the Appeals Board is very careful not to discuss or mention the Shipping Articles or the shipping contract in any way. The decision of the Appeals Board, p. 1, says that appellant "received from War Shipping Administration" the $5000 of insurance. Said decision says, p. 8, that the insurance payments of $5000 "were made by authorization of the War Shipping Administration, through its agent, the United States Lines".

But the plain fact is that the U. S. Lines Co. in the Shipping Articles contracted to pay the $5000 of insurance, in the provision: "It is further agreed that war bonus payments and insurance will be paid in accordance with decisions of the Maritime War Emergency Board" (supra p. 6). The fact, if it be a fact, that the U. S. Lines Co. was an agent of War Shipping Administration was not material. Rivera, as seaman, had the right to contract with the U. S. Lines Co. as a principal. If it was in fact an agent, its principal was not disclosed. The Shipping Articles were of course a contract between the Captain and the U. S. Lines Co. and the seaman.

The decision of the Appeals Board says, p. 8, that appellant was "insured as provided by Public Law 677 and 523, amending the Merchant Marine Act, 1936". But the plain and undisputed fact is that Rivera was insured by the U. S. Lines Co. by contract in the Shipping Articles, the amount of which was fixed by the Maritime War Emergency Board, which was not a U. S. agency.

38 Said Public Law 677 is an Act of June 29, 1940, 54 Stat. 689, which authorized the U. S. Maritime Commission (not War Shipping Admin.) to insure crew members against loss of life and personal injury. Said Public Law 523 is an Act of Apr. 11, 1942, 56 Stat. 214, which transferred the authority of the Maritime Commission to insure crew members, to War Shipping Admin. which had been created by order of the President dated Feb. 7, 1942. Both of said acts authorized the re-insurance of companies which had made such insurance. Each of said Public Law 677 and said Public Law 523, contained the express provision:

> "Nothing in this subtitle (Subtitle-Insurance) shall be deemed to affect the rights of Seamen under any provision of existing law." (Sec. 227 of each of said Acts)

And when Congress amended Sec. 7 of the Compensation Act, by the Act of Oct. 29, 1949, Sec. 201, so as to make claims under the Compensation Act exclude any other liability of the United States or of any instrumentality of the U. S. for the same injury to an employee "under any other workmen's compensation law or under any Federal tort liability statute", Congress put into said amendment of Sec. 7:

> "Provided, however, that this subsection shall not apply to a master or a member of the crew of any vessel."

Thus Congress has been meticulously careful to retain to seamen their full rights, and not to cut them down in any way. Rivera was a seaman. Congress has also been careful to keep separate and apart the right of any employee under any insurance policy, and his right under the Compensation Act, see quoted amendment to Sec. 7, by Act of 7/1/44, supra p. 15.

But nothing in said Public Laws 677 and 523 could fix the amount of such insurance, or make or alter the contract of U. S. Lines Co. under which Rivera as seaman of the Nathaniel Greene signed on. That was made in the Shipping Articles, containing contract to pay insurance in amounts as should be ordered by the Maritime War Emergency Board. And that came on the agreement between the unions and the shipping companies, dated Dec. 18, 1941, set forth supra pp. 6-8.

The decision of the Appeals Board says, p. 7, that "the United States Lines made the disbursement for appellant's wages and bonuses from the date of injury to December 26, 1942". Of course the U. S. Lines Co. made said payments, under its contract in the Shipping Articles. And the same applies to the maintenance and insurance.

The decision of the Appeals Board says, p. 6:

> "The maintenance paid to appellant for the period December 27, 1942 to August 14, 1943 was paid by the former War Shipping Administration through the United States Lines".

Of course said maintenance of $577.50 for support as an outpatient was paid by the U. S. Lines Co. as the operator and owner, at least so far as the seaman was concerned. It is wholly immaterial what accounting arrangement the U. S. Lines Co. had with the U. S. The U. S. Lines Co. by its Captain operated the ship as principal, and dealt with the seaman as principal.

The decision of the Appeals Board says, p. 7: "Seaman's maintenance *** clearly does not come within the provisions of Section 9 or any other provision of the Compensation Act. Furthermore, the payment of seaman's maintenance is not within the province of the Bureau or the Board".

Thus the Appeals Board says that it has no jurisdiction over payment of "seaman's maintenance". But clearly, and by settled law, seaman's maintenance is a contracted obligation, as part of his wages. And the insurance, in this case is also clearly a part of his wages, and so to charge it back as a set off is also not within the jurisdiction of the

Appeals Board.

The decision of the Appeals Board says, p. 7:

"While the United States Lines made the disbursement for appellant's wages and bonuses from date of injury to Dec. 26, 1942, the disbursement was made from
40 funds of the United States."

Thus the Appeals Board wholly excluded the U. S. Lines Co. as the contracting and paying party. In fact the entire payments of insurance, maintenance, and wages back to home port were as matter of law paid by the U. S. Lines Co. as the operator of the ship and the contracting party with the seamen. Said items were obviously paid as wages contracted for. They were all paid for services which were fully performed as of 9/14/42, and they were all fully earned as of 9/14/42. The Board had no jurisdiction to charge said items of wages back as set offs.

The decision of the Appeals Board wholly fails and refuses to consider or mention in any way the fact that Rivera worked under a contract contained in the Shipping Articles, expressly stating: "It is further agreed that war bonus payments and insurance will be paid in accordance with decisions of the Maritime War Emergency Board"; and that said clause of the contract was put in after a long worked out agreement between the unions and the shipping companies, and the appointment at their request, by the President, of said Maritime War Emergency Board, to implement by its decisions said agreement of the unions and the shipping companies to fix the wages on the voyage.

The decision of the Appeals Board, p. 9 refers to the Act of Sept. 30, 1944, P.L. 449, under which the War Shipping Admin. is authorized to make certain payments per rate schedule to members of the crew of vessels operated for the account of War Shipping Admin. *for disability* from causes arising from the war effort; and said Act provides that to the extent of such payments the War Shipping Admin. shall have a lien on any compensation to which the person may be entitled under the Act of 9/7/16. (Acts of 9/30/44, 58 Stat. 758; and of 12/2/42, 56 Stat. 1032.) Said reference by the Appeals Board is clearly a plain mistake.

Said Act of 9/30/44, P.L. 469, was enacted long after Rivera was

injured on 9/14/42, and long after the date of his contract dated 3/27/42. Said P.L. 449 can not be in point. It is ex post facto. And moreover,

41 said Act of 9/30/44 refers to payments made by the War Shipping Admin. where they were not made under contract, and where there was no obligation to make them.

And the War Shipping Admin. made no payments to Rivera. The U. S. Lines Co. paid him the wages contracted for which included the insurance as part of the wages. The War Shipping Admin. could have no lien on the $5000 of insurance which was part of the wages contracted for and paid by the U. S. Lines Co..

The decision of the Appeals Board, admits that it is applying statutes beyond and outside of their terms, in its desire to cut out Rivera's insurance as wages. It says p. 9:

> "It is necessary to consider and fit, as fairly as possible, the entire statutory system of remedies against the government to make it a workable, consistent and equitable whole."

Then the decision goes on to cite said Public Law 447 of 1944, which was enacted more than 2 years after the injury, and which allowed War Shipping Admin. to make payments voluntarily. And then the decision cuts out Rivera's insurance which was made and paid by the U. S. Lines Co. under contract with Rivera, and as part of his wages, expressly made so in the Shipping Articles. In the Shipping Articles the U. S. Lines Co. contracted that said insurance would be paid. The checks which came to Rivera were checks of the U. S. Lines Co. It is wholly immaterial to Rivera's contract right to the insurance, to what account, if any, the U. S. Lines Co. charged the payments by it. Moreover, it was not until Jan. 28, 1943 that the Maritime War Emergency Board made an order, that if the shipping company insured the seaman by a policy, in the form prescribed by said Board, obtained from the War Shipping Admin. that should be deemed fulfilment of its obligation to insure (5 F. Sup. 963).

But at no time would any insurance of the seaman by the shipping company with any insurance carrier, take insurance contracted for as

wages in the Shipping Articles out of the category of wages. The Ap-
42 peals Board has done that, wilfully and by itself.

The War Shipping Admin. was not created until Feb. 7, 1942, which was shortly before Rivera's contract of Mar. 27, 1942 (7 Fed. Register (1942) 837).

The foregoing shows that the Appeals Board failed and refused to consider in any way the fact that Rivera contracted for his insurance as part of his wages, along with the war bonuses. It shows that by the words of the Appeals Board, itself, the maintenance and other wages of the seaman are not within the jurisdiction of the Appeals Board, to make payments; thereon, or to set them off against workmen's compensation. The foregoing shows that as matter of law the insurance, maintenance, and wages back to home port, are all included in the wages of the seaman. And shows that said wages are a separate matter from workmen's compensation, and a matter over which the Appeals Board has no jurisdiction to set off said wages from workmen's compensation.

POINT VIII.

THE APPEALS BOARD HAD NO JURISDICTION TO REFUSE TO APPRAISE AND EVALUATE THAT PART OF THE SEAMAN'S WAGES WHICH CONSISTED OF HIS MAINTENANCE ON BOARD SHIP FROM 3/27/42 TO 9/14/42, THE DATE WHEN HE WAS INJURED.

Like any other seaman Rivera received as part of his wages from the U. S. Lines Co. his maintenance including lodging on board ship before he was injured. Said maintenance on board ship was part of his wages which go to make up his average monthly pay during the time of his service from 3/27/42 to 9/14/42. The Appeals Board had no jurisdiction to refuse to appraise and evaluate said maintenance on board the ship.

The decision of the Appeals Board says, p. 4:

> "Neither the Bureau nor the Board determines the value of subsistence and quarters. It is determined by the employing establishment. In so far as the record shows, these items were reported to be $1.20

per day."

43 Thus the Appeals Board expressly refused to determine or appraise the value of his subsistence and quarters on board the ship. It took instead merely a statement "reported" to the Bureau by some employee of the U. S. Lines Co. which took the value of this maintenance and lodging at $1.20 per day and $36 per month. The adjudged cases hold the value of such maintenance and lodging on board ship to be from $3.00 to $4.00 a day. In Fraser v. U. S. (1944) 1 F. Sup. 1, aff'd 167 F. 2d 141, the maintenance and lodging on ship was referred to as "found", and was held to be "worth somewhere between $3 and $4 per day" (1 F. Sup. 4). Everybody connected with the case knew that the value of such maintenance and lodging on ship was worth from $3 to $4 per day. But the Appeals Board expressly refused to appraise it so as to cut down the average monthly pay of Rivera.

The Appeals Board had no jurisdiction to refuse to appraise the value of such maintenance and lodging, and its refusal to do so is an act outside of its jurisdiction and is subject to Court review and reversal.

POINT IX.

THE DISTRICT COURT HAS JURISDICTION TO REVIEW THE DECISION OF THE APPEALS BOARD, WHICH THE APPEALS BOARD HAD NO JURISDICTION TO MAKE.

As held by Justice Reed in Soc. Sec. Brd. v. Nierotko 327 U.S. 358, 369: "Administrative determinations must have a basis in law and must be within the granted authority. *** An agency may not finally decide the limits of its statutory power. That is a judicial function."

In that case the review was by an action in the U. S. District Court (149 F. 2d 273).

The Act for judicial review of agency action (5 U.S.C. 1009) provides that "except so far as statutes preclude judicial review", any person aggrieved by such action "shall be entitled to judicial review thereof". That "the form of proceeding for judicial review shall be *** any applicable form of legal action (including actions for declaratory

judgments ***) in any Court of competent jurisdiction". That the scope
44 of review shall include whether the agency action is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right".

In this case the Appeals Board has clearly gone outside of its jurisdiction and used contract wages earned from the U. S. Lines Co. and paid by it, to the seaman, as a set-off from workmen's compensation found to be due to the seaman under the Act of 9/7/1916.

Section 793 of the Compensation Act (5 U. S. C. 793) provides that acts of the official under it "shall be final and conclusive *** and not subject to review by any other official of the United States, or by any Court *** and credit shall be allowed in the accounts of any certifying or disbursing officer for payments in accordance with such action."

But this provision that there shall be no review naturally does not apply where the acts done by the agency are outside of the jurisdiction of the agency. In this case the acts done by the Appeals Board are outside of the subject-matter of the Compensation Act.

The jurisdiction of the Appeals Board is limited to the matter of decisions under the Compensation Act. The Appeals Board has in this case gone into another matter, and used the wages of the employee which he earned from the U. S. Lines Co. as a set-off against compensation due him from the U. S. under the Compensation Act. In doing so the Appeals Board has taken property from the plaintiff without due process of law. It amounts to a confiscation of plaintiff's contract wages which he earned from, and received from, the U. S. Lines Co. which was plaintiff's employer under the Shipping Articles.

Defendant's memorandum makes a point that the defendant, Appeals Board, is not a suable entity. But this is an action under the "Act for judicial review of agency action" (5 U.S.C. 1009). The Secretary of Labor is the necessary party. And under said Act the Appeals Board, as the acting agent is merely named as a defendant. In any event it does no harm that the Appeals Board is also named as a defendant.

45 The Action is also an action in equity to prevent an officer, or

officers, who have done acts which were as matter of law outside of their statutory authority, from illegally continuing to deprive the plaintiff of the contract wages which he earned as seaman from the U. S. Lines Co. and which were paid to him by U. S. Lines Co.. Such an action may always be maintained.

Amer. School of Magnetic Healing v. McAnnulty, 187 U.S. 94, (1902) was an action in the federal court for an injunction to prevent the postmaster of the City of Nevada, Missouri, from depriving the plaintiff from the use of the mails. The defendant was acting with the Postmaster General of the Post Office Department, Washington, D. C. It was held that where an administrative officer does acts which are outside of his statutory authority as matter of law, a person injured thereby may sue him in the federal court to prevent him from doing so. Mr. Justice Peckham pp. 109-10, says:

> "The facts, which are admitted of record show that the case is not one which by any construction of those facts is covered or provided for by the statutes under which the Postmaster General has assumed to act, and his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts, and the Courts, therefore, must have power in a proper proceeding to grant relief. Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual. Where the action of such officer is thus unauthorized he thereby violates the property rights of the person whose letters are withheld."

46 It was held that on the statutes and facts the plaintiff was entitled to an injunction. Said McAnnulty case has been very much cited, and followed, as settled law. It is applicable here as an additional reason for jurisdiction in the present suit.

Defendants cite cases like Kansas City P. Co. v. McKay, 225 F. 2d 924, where it was held that an action could not be maintained to enjoin acts done under the Rural Electrification Act. And defendants cite cases like California Water Co. v. City of Redding, 304 U.S. 255, where it was held in an action for an injunction that no federal question was presented. And defendants cite cases like Brasier v. U.S. 223 F. 2d 762, where it was held that the Administrator of Veterans Affairs had properly terminated a contract made by him for instruction of veterans in a Barber College. In said cases there was no issue as to review of Acts done by an agency outside of its jurisdiction. And those cases are clearly not in point.

CHRONOLOGICAL STATEMENT OF CONTRACT, CREATION OF WAR SHIPPING ADMIN. AND STATUTES HAVING ANY POSSIBLE BEARING ON THE ISSUES.

On March 27, 1942 the Shipping Articles contract was made with U. S. Lines Co. providing that insurance should be paid by U. S. Lines Co. in accordance with decisions of the Maritime War Emergency Board. This made insurance a part of the wages earned from U.S.L. Co. This contract has no reference to any statute or to any U. S. agency.

On Feb. 7, 1942, War Shipping Admin. was created by order of the President, 7 Fed. Reg. 1942, p. 837.

On April 11, 1942, (after Rivera's contract), P. L. 523 of 1942 was enacted, 56 Stat. 214, giving War Shipping Admin. its first power to insure seamen. The Maritime Commission was previously given such power by the Act of June 29, 1940, P.L. 677 of 1940, 54 Stat. 689. Neither the War Shipping Admin. nor the Maritime Commission had anything to do with Rivera's contract with the U. S. Lines Co.. Both of said P. L. 677 and said P. L. 523, provided that "nothing" therein

47 "shall be deemed to affect the rights of seamen" which included Rivera (Sec. 227).

On March 24, 1943 was enacted P. L. 17 of 1943, 57 Stat. 45, called "Clarification Act". That Act removed seamen from being U. S.

employees under the Compensation Act of 9/7/16. But it carefully saved any such right of any seaman which had already accrued after Oct. 1, 1941, so as to save such right of Rivera. Said P. L. 17 also provided that in a case where the War Shipping Admin. would be authorized to insure a crew member or other person on a ship operated for its account, it might merely deem such person insured and pay insurance for an injury related to the war effort, although the person had not been insured. Said payment of insurance to a person who was only deemed insured, but not actually insured, was not made under contract or for a charge or consideration. To that extent it was free or gratuitous insurance. And said Act provided that such payments by War Shipping Admin. to such a person only deemed insured, should apply "in pro tanto satisfaction" to a claim of such person against the U. S. arising out of the same injury.

On July 1, 1944 was enacted P. L. 410 Sec. 605, 58 Stat. 712. Said section 605 amended Sec. 7 of the Compensation Act of 9/7/16 (which specifies the amount of payments) so as to provide that if an injured employee was entitled to compensation benefits under 2 Compensation Acts, he must elect under which Act he shall claim. But said Act specified that "the proceeds of any insurance policy" shall not require any such election. Thus said Act provided in substance that insurance and workmen's compensation are separate matters, and are not to be confused.

On Sept. 30, 1944 was enacted P. L. 449 of 1944, 58 Stat. 758, which gave War Shipping Admin. power to make payments to members of the crew or other persons on ships operated for its account, in accordance with rate schedules provided in the Compensation Act of 9/7/16, for "permanent total or partial disability"; "such payments to commence if and when insurance benefits provided by the War Shipping Admin. for
48 such person shall have been exhausted". And such payments being in substance another compensation act, said P. L. 449 provided that for payments made under it, and for insurance paid, the War Shipping Admin. should have a lien on compensation due to the person so paid, "in the manner provided in the last paragraph of subsection (c)

of section 105 of the Act approved Dec. 2, 1942", which is 56 Stat. 1032, P. L. 784 of 1942, "as amended by Public Law 216, 78th Congress approved Dec. 23, 1943," which is 57 Stat. 627.

The Act of 12/2/42 (56 Stat. 1028) which is thus incorporated by reference in the above statute, extended the "Longshoremen's and Harbor Workers' Compensation Act" of 3/4/27 (44 Stat. 1424) to persons employed by the U. S. under contract for personal services in Hawaii, Alaska, Puerto Rico, or the Virgin Islands; and said act included compensation for capture and detention. And extended said Longshoremen's Compensation Act to persons employed by the U. S. or by a contractor at U. S. Military bases in foreign countries (55 Stat. 622). And subsection (c) of said Act of 12/2/42 as amended by the Act of 12/23/43 (57 Stat. 627) incorporated by reference in the Act of 9/30/44, as above shown, merely provides that when a person has obtained benefits from the Commission "under this title", i.e. under the Longshoremen's Compensation Act, and later claims wages or any sum for services rendered, the cost of which may be paid by the U. S. the Commission shall have a lien on said claim to the extent of "payments paid and payable under this title". Said subsection (c) has no application to Rivera's wages.

Rivera has never made any claims except for Compensation under the Act of 9/7/16. He has been paid his contracted wages, including insurance, by the U. S. Lines Co. The War Shipping Admin. has never made him any payment. The War Shipping Admin. had no power to insure Rivera until Apr. 11, 1942, which was after Rivera's contract with U. S. Lines Co. And said Act of 9/30/44 was enacted long after Rivera's contract and long after his injury on 9/14/42. Whatever arrangement the U. S. Lines Co. had with War Shipping Admin. cannot
49 be charged to Rivera in any way. He contracted solely with U.S. Lines Co. for the insurance as part of his wages. And he was clearly entitled to so contract.

On Oct. 14, 1949 was enacted P. L. Sec. 201 of 1949, 63 Stat. 861. Said Act amended Sec. 7 of the Compensation Act, by adding a new section (b), so as to provide that the liability of the U. S. or any of its

instrumentalities under the Compensation Act, with respect to the injury of an employee, shall be in the place of all other liability to the employee on account of such injury in any action or "under any other workmen's compensation law". But as said Act added: "Provided, however, that this subsection shall not apply to a master or a member of the crew of any vessel". Said Act has no application here except to show how careful Congress was, not to reduce the rights of any seaman, including Rivera. Rivera is not making any claim except for workmen's compensation. He received his wages from U. S. Lines Co. with which he contracted and dealt exclusively. The Appeals Board has ignored his contract rights, and ignored the Shipping Articles, and treated Rivera as if his insurance and other wages came to him from War Shipping Admin. and not from U. S. Lines Co., and came to him as a sort of gratuity.

The foregoing shows that the statutes do not purport to affect Rivera's contract rights with the U. S. Lines Co. for his wages including the insurance. And shows that his wages are an entirely separate matter from compensation under the Act of 9/7/16. And shows that the Appeals Board had no jurisdiction to set-off his paid wages from his workmen's compensation. The decision of the Appeals Board, p. 9, says that it is acting "to consider and fit *** the entire system *** to make it a workable consistent and equitable whole". It thus strove and went beyond the statutes, and it wholly ignored Rivera's contract for wages including insurance. It makes Rivera's Shipping Articles contract with U. S. Lines Co. disappear as if by magic.

50

POINT X.

DEFENDANTS' MOTION TO DISMISS THE COMPLAINT SHOULD BE IN ALL RESPECTS DENIED.

Said motion is based on a claim that there is no possible jurisdiction on the matters alleged in the complaint, and nothing to be tried.

Respectfully submitted,

/s/ JESSE L. ROSENBERG, ESQ.
Counsel for Plaintiff

/s/ WILLIAM C. KOPLOVITZ, ESQ.
Counsel for Plaintiff

WESLEY S. SAWYER, ESQ.
Of Counsel

September 17, 1956

51 (CERTIFICATE OF SERVICE)

* * * * * *

[Filed Oct. 16, 1956]

52 ORDER GRANTING MOTION TO DISMISS

This action came on to be heard upon the motion of Defendants to dismiss the complaint, and the Court having found that it lacks jurisdiction of the subject matter of the action in that there is no justiciable right which could support application for the relief sought, that this suit is in substance an action against the United States of America which has not consented to be sued in such matters and has not waived its immunity from suit, it is this 16 day of October, 1956

ORDERED that Defendants' motion to dismiss the complaint be and the same hereby is granted, and that the complaint be, and it hereby is, dismissed.

/s/ ALEXANDER HOLTZOFF

No objection as to form:

/s/ WILLIAM C. KOPLOVITZ

Attorney for Plaintiff

[Filed Dec. 11, 1956]

53 NOTICE OF APPEAL

Notice is hereby given this 11th day of December, 1956, that RAFAEL RIVERA, plaintiff, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 16th day of October, 1956 in favor of James P. Mitchell, Secretary of Labor, and Appeals Board of the Employees Compensation Bureau, defendants, against said plaintiff.

/s/ JESSE L. ROSENBERG, ESQ.

/s/ WILLIAM C. KOPLOVITZ, ESQ.
Attorneys for Plaintiff.

December 11, 1956

The Clerk will please mail a copy of this notice of appeal to each of the following:

Oliver Gasch, Esq.
United States Attorney

* * * * * * *

Ward E. Boote, Esq.
Assistant Solicitor
U. S. Department of Labor
Attorneys for Defendants.

* * * * * * *